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" A man's rights are to be determined by the Court, not by his advocate or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, ' I want your advocacy, not your judgment : I prefer that of the Court '."

—BRAMWELL, B., in *Johnston v. Emerson and Sparrow*, (1871) L.R. 6 Exch. 329, 367.

Vol. XIII. Tuesday, December 7, 1937. No. 22

Shares Offered " for Subscription or Purchase."

IN our last issue, we summarized the judgments of their Honours who comprised the Full Court, which, in *Calvert v. Mackenzie*, p. 303, *ante*, for the first time gave judicial interpretation of the words " to go from house to house " in s. 343 of the Companies Act, 1933, which follows the wording of s. 356 of the Companies Act, 1929 (Eng.), a section that has been substantially reproduced in the various Companies Acts which have since been enacted in other parts of the British Commonwealth.

It is our present intention to consider the judgment of the learned Chief Justice, who, alone among the members of the Court, directed his attention to interpretation of the words " offering shares for subscription or purchase," also appearing in the " share-pushing " section to which we have just referred. But, before coming to His Honour's judgment, it is necessary that we should relate the facts as found in *Calvert v. Mackenzie*. These are taken from the judgment of Mr. Justice Kennedy, who heard the evidence on the appeal :

> The appellant was convicted upon a charge of going from house to house offering shares for subscription. The acts complained of were said to have been committed during the months of July and August, 1935, at Riverton and elsewhere in New Zealand. Shares were said to have been offered to certain members of the public—namely, debenture-holders in the Investment Executive Trust of New Zealand, Ltd. The information, as amended, named eight persons to whom shares had been offered.
>
> Debentures were issued by the Investment Executive Trust of New Zealand, Ltd. (hereinafter called the " I.E.T."), a company which pursuant to the Companies (Special Liquidations) Act, 1934-35, was to be wound up by the Court. V. B. McInnes and Co., Ltd., acted as sole selling-agents in New Zealand for debentures issued by the I.E.T. The appellant was an employee of V. B. McInnes and Co., Ltd., from September, 1932, to November, 1934. He went to Dunedin in August, 1933, and held the position of manager there until the offices of V. B. McInnes and Co., Ltd., were closed down in November, 1934. He was employed by Mr. McArthur for a short time to keep in touch with debenture-holders. Then he carried on a typewriter business, and in June, 1935, he was engaged by a company, called the McArthur Trust, Ltd., to submit to the I.E.T. debenture-holders in Otago and Southland a proposal for the exchange of shares in the McArthur Trust, Ltd., for debentures in the I.E.T. The appellant was supplied with a list of debenture-holders numbering about a hundred and seventy. He was to be paid a commission of 2½ per cent. on business done. Having got the list he proceeded to call upon debenture-holders wherever he could find them, commencing the canvass in June, 1935, by going to those nearest to his home, and later taking a trip through Southland which occupied about a month. During the course of that trip he visited at their homes each of the persons named in the information. Each person was a holder of debentures in the I.E.T. While acting as manager for V. B. McInnes and Co., Ltd., the appellant had made at least one visit to each of the persons called upon. The debentures held by the persons called on had been bought or taken up through V. B. McInnes and Co., Ltd., either while the appellant was manager or before he came to Dunedin. Each had been visited by him personally in connection with the debentures, and some of them in connection with other business. Where a proposal was agreed to, the appellant issued an interim receipt, which provided for signature also by the other party, for debentures acknowledging cash and transfers " to be applied subject to the acceptance by the directors towards payment " of ordinary and preference shares " in the McArthur Trust, Ltd., in terms of our application dated . . . ," &c. These transfers and applications were forwarded to the McArthur Trust, Ltd., from which was later received an intimation of the allotment of shares fully paid up.

Subsection (2) of s. 343 of the Companies Act, 1933, which substantially reproduced s. 356 of the Companies Act, 1929 (Eng.)* is as follows :—

> (2) It shall not be lawful for any person to go from house to house *offering shares for subscription or purchase* to the public or any member of the public. In this subsection the expression " house " shall not include an office used for business purposes, or any premises used by the occupier wholly or partly for the purpose of carrying on any trade, business, profession, or calling. Nothing in this subsection shall apply with respect to the offering for subscription of shares in any co-operative dairy company or other co-operative company.

His Honour the Chief Justice discussed the question as to whether on the facts, as outlined, there was an " offering of shares for subscription or purchase " within the meaning of that subsection. He considered that those words must be construed by analogy with the same words in the definition of " prospectus " in s. 1 of the statute,† where " prospectus " is defined as " any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of a company."

His Honour first distinguished between shares which are necessarily shares that have not been issued, and for which the public are invited to subscribe, and shares which have already been issued and allotted to third parties by or on whose behalf the prospectus is issued, and which the public are invited to purchase. In relation to the former class, there may be a prospectus issued either by or on behalf of a company itself offering to the public shares of such company ; and, with regard to the latter class, there may be a prospectus issued by or on behalf of third parties who, prior to the issue of the prospectus, have acquired shares in that company. The provisions of the Companies Act referable to the issue of a prospectus, contemplate both classes of prospectus : for the distinction between a " subscription " prospectus and a " sale " prospectus, His Honour referred to *Buckley's Companies Acts*, 11th Ed. 71, 645, and *Stiebel's Company Law and Precedents*, 3rd Ed. 157.

* *Cf.* Companies Act, 1929 (Eng.) s. 356 ; Companies Act, 1936 (N.S.W.), s. 343 ; Companies Act, 1931 (Qld.), s. 368 ; Companies Act, 1934 (South Aust.), ss. 365, 369 ; Companies Act, 1927 (Tas.), ss. 1-6.

† *Cf.* Companies Act, 1929 (Eng.), s. 380 ; Companies Act, 1936 (N.S.W.), s. 6 (1) ; and for the references to the corresponding Victorian, Queensland, South Australian, and Tasmanian definition, see *Pilcher's Australian Companies Acts*, p. 8.

The shares in McArthur Trust, Ltd., which were available to be taken up by the persons whom the appellant visited, were unissued shares in the capital of the company. Consequently, His Honour proceeded :

> " The words ' or purchase ' have no application in this case, and the question therefore is whether or not the appellant can be said to have ' offered shares for subscription.' As I have said already, those words must be construed in precisely the same sense as the same words in the definition of ' prospectus.' That ' subscription ' in the ordinary sense meant application followed by allotment and not subsequent purchase is shown by *Peck v. Gurney*, (1873) L.R. 6 H.L. 377 ; and it appears from *Arnison v. Smith*, (1889) 41 Ch.D. 348, that when used in connection with a prospectus it involves an agreement to take shares by means of a formal application or otherwise under which agreement there is a liability to pay for the shares in money. And it appears to me that that is necessarily so when one considers the provisions in the Companies Act relating to ' minimum subscription ' in connection with a prospectus."

Turning again to s. 343 (2), His Honour was of the opinion that it was the substance of the transaction that must be regarded for the purpose of that subsection. So, in order to ascertain what was the real substance of the transaction in the case under notice between McArthur Trust, Ltd., or the appellant on its behalf, and the various persons upon whom the appellant called, he analysed the facts :

> " McArthur Trust, Ltd., had not issued a prospectus in New Zealand inviting subscriptions for shares from the public, so that the appellant was not offering shares in that way. Each and every one of the persons upon whom the appellant called, or intended to call, had certain property which McArthur Trust, Ltd., was desirous of acquiring. The essential purpose of the appellant's visits was to purchase that property on behalf of McArthur Trust, Ltd. True, the scheme was to allot shares in McArthur Trust, Ltd., as the consideration for the purchase of the debentures, but none the less the essence of the transaction seems to me not to have been to make an offer of shares but to purchase the debentures held by the person upon whom he called. It is quite true that not only did each holder of debentures from whom the appellant arranged to purchase sign an instrument transferring the debentures to the McArthur Trust, Ltd., but the form of interim receipt given by the appellant to the debenture-holders for their debentures suggests that the debenture-holder also signed an application for shares in that company to the extent of the amount of the consideration that the company was to pay for the debentures ; and, in due course, shares were accordingly allotted. The actual application, if in fact there was an application signed, has not been put in. But actually an application for shares was in no way necessary to the transaction. The instrument transferring the debentures was necessarily held by the appellant as an escrow, pending the performance of the condition—namely, the allotment of shares forming the consideration for the purchase—and the transaction could have been completed without any form of application at all."

And His Honour concluded that the substance of the transaction in which the appellant was concerned was the purchase of the debentures (in consideration of the allotment of shares), and not the offering of shares for subscription. At the most, His Honour said, there was an exchange or barter of property—debentures in the I.E.T. for shares in McArthur Trust, Ltd.—and, looking at the substance of the transaction—as the signing (if it were signed) of an application for shares and the notice of the allotment might be disregarded as being superfluous—the case could not be said to have been one of subscription for shares at all.

That the view that His Honour had expressed of subs. (2) of s. 343 was the true one, is, it seems, further shown by subs. (8) of that section, which is as follows :

> (8) Where any person is convicted of having made an offer in contravention of the provisions of this section, the Court before which he is convicted may order that any contract made as a result of the offer shall be void and, where it makes any such order, may give such consequential directions as it thinks proper for the repayment of any moneys or the retransfer of any shares. Where an order is made under this subsection (whether with or without consequential directions) an appeal against the order and the consequential directions, if any, shall lie to the Supreme Court.

His Honour pointed out that this subsection speaks only of the " repayment " of money, or the " retransfer " of shares ; and, he said :

> " ' Retransfer ' of shares can refer only to the case where the transaction has been the ' purchase ' of shares—*i.e.*, shares previously issued. ' Repayment ' of money applies to the case of either subscription or purchase ; in either case, where subs. (2) applies, there would have been a payment of money by the person visited who subscribed for or purchased shares, and therefore repayment could be ordered under subs. (8). But, in the present case, there was no such payment of money, and the case, in my opinion, comes within neither subs. (2) nor subs. (8)."

The other members of the Court did not deal with the foregoing matters, as the proof of going " from house to house " was insufficient to sustain the charge. Their Honours preferred to reserve their opinion on the question whether the appellant offered shares for subscription or purchase, dealt with in the persuasive judgment of the learned Chief Justice.

Summary of Recent Judgments.

SUPREME COURT.
Wanganui.
1937.
Aug. 24, 25, 26, 31 ; September 1 ; October 4.
Smith, J.

PLIMMER v. O'NEILL AND OTHERS.

Contract—Performance—Restriction on Area—Option exercised by one Individual on behalf of two Companies to be incorporated—Whether a concluded Contract—Condition precedent—Cheque paid as Deposit—Whether in Power of two Partners to vary Terms of Option against third Partner repudiating—Want of Fairness.

Three defendants in an action in which the plaintiff sought a declaration that an option accepted by him was valid and binding upon the defendants and a decree for specific performance of the contract, carried on business in partnership as sheep-farmers on about 7,500 acres of freehold and leasehold lands, certain of which were subject to restrictions imposed by legislation that rendered it necessary that the lands of the partnership must be acquired and held by at least two persons in severalty. On February 19, 1937, the partners all signed an option, open for acceptance until May 31 following, for the sale of the lands, and certain cattle, stock, and plant as a going concern, to W. Ltd., the option to be exercised on behalf of some person, firm, or company introduced by you, the sum of £5,000 to accompany the acceptance of the offer, a clause referred to the restrictions as to area. In two clauses the term " the purchasers " was used.

T., one of the defendant partners, who was in hospital when he signed the option, and in March wrote to W. Ltd. stating that he would not have signed the agreement had he understood the conditions, repudiated it, and stated that he would not sign the transfer. W. Ltd., nevertheless on May 28, 1937, accepted the offer on behalf of P., enclosed its cheque for £5,000 deposit, and stated that the transfers to be submitted would be in favour of two companies about to be incorporated, on behalf of which P. entered into the agreement. Two private companies were incorporated, and a transfer of lands in one schedule to one company and of lands in other schedules to the other company were signed by all necessary parties but T. The other two defendants filed a confession of the plaintiff's claim except as to damages, which the plaintiff did not seek to recover. T. filed a statement of defence.

O'Leary, K.C., and **Evans,** for the plaintiff; **Cooke,** K.C., and **A. M. Ongley,** for the first defendant; **A. B. Wilson,** for the second and third defendants.

Held, giving judgment for T. on the whole action, 1. That the option, on its true construction, was not open to acceptance by a single individual, and, as the acceptance being on behalf of two companies about to be incorporated there was never any concluded acceptance of the option.

2. That as the cheque for £5,000 was not legal tender, there was a failure of a condition precedent; that the transaction was one for ending, not carrying on, the partnership business; and that, under the partnership agreement, neither of the other two partners had any authority to vary any term of the option on behalf of the third, T.

3. That, on a survey of the evidence of T.'s condition when he signed the option, if there were a concluded contract, the Court should exercise its discretion by refusing to decree specific performance upon the ground that T. when he signed was not in a position to exercise his faculties properly upon the effects and results of the option and did not appreciate what it meant to him.

Solicitors: Bell, Gully, Mackenzie, and Evans, Wellington, for the plaintiff; **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for the defendant T. O'Neill; **Marshall, Izard, and Wilson,** Wanganui, for the defendants F. J. O'Neill and J. O'Neill.

SUPREME COURT. AUCKLAND 1937. Oct. 18, 26. *Callan, J.*

THE KING v. KAMO COLLERIES, LIMITED, AND OTHERS.

Easement—Right to Support—Support from Subterranean Water—Drainage by pumping on adjoining Land—Withdrawal of not merely ordinary percolating but static Water under Railway Reserve—Subsidence—Whether it "obstructs the working of a railway"—Railways Act, 1926, s. 29 (b).

It is not actionable to cause a subsidence of land by the withdrawal of the support of underground water by one draining his own land by draining, pumping, or otherwise, unless a right to such support has been acquired by express or implied grant.

Under a Railway reserve, over which a railway ran, and the land of the defendants adjoining it on either side were disused mine workings, which had been abandoned on account of crushing of the pillars and fire, and which upon such abandonment were flooded with water, preserving the workings and preventing the subsidence of the land above them.

The Crown, which did not allege any grant of support, brought an action against the defendants claiming that the reserve was entitled to support from water in the old workings and that the defendants had wrongfully withdrawn and intended to continue to withdraw such water.

On the motion for an order rescinding an interim injunction granted by *Reed, J.*, restraining such withdrawal, it was admitted that the pumping operations of the defendants were entirely within their own land, and affected only subterranean percolating water. It was assumed that such operations would entail the withdrawal of water left under the Railway reserve in the flooded mine workings, the disintegration, probable fire, and collapse of the support of such workings, and the subsidence, probably sudden and dangerous, of the surface of the Railway reserve.

Trimmer and **Turner,** for the defendants, in support; **Meredith** and **McCarthy,** for the plaintiffs, to oppose.

Held, 1. That the Crown had not established any right to an injunction.

2. That the defendants had not been guilty of an offence under s. 29 (*b*) of the Railways Act, 1926, of doing "any act which obstructs or might obstruct the working of a railway, or endangers or might endanger the lives of persons travelling thereon."

Chasemore v. Richards, (1859) 7 H.L. Cas. 349; 11 E.R. 140; **Popplewell v. Hodkinson,** (1867) L.R. 4 Exch. 248; **Acton v. Blundell,** (1843) 12 M. & W. 324; 152 E.R. 1223; **New River Co. v. Johnson,** (1860) 2 E. & E. 435; 121 E.R. 164, applied.

Jordeson v. Sutton, Southcotes, and Drypool Gas Co., [1899] 2 Ch. 217, explained.

Gill v. Westlake, [1910] A.C. 197, and **Allen v. Flood,** [1898] A.C. 1, 138, referred to.

Bald v. Alloa Colliery Co. and the Earl of Mar, (1854) 16 Dunl. (Ct. of Sess.) 870, distinguished.

Solicitors: Connell, Trimmer, and Lamb, Whangarei, for the defendants; **V. R. S. Meredith,** Crown Solicitor, Auckland, for the plaintiffs.

Case Annotation: *Chasemore v. Richards,* E. & E. Digest, Vol. 44, p. 34, para. 252; *Popplewell v. Hodkinson, ibid.,* Vol. 19, p. 167, para. 1162; *Acton v. Blundell, ibid.,* Vol. 44, p. 34, para. 129; *New River Co. v. Johnson, ibid.,* p. 35, para. 253; *Jordeson v. Sutton, Southcotes, and Drypool Gas Co., ibid.,* Vol. 38, p. 32, para. 179; *Gill v. Westlake, ibid.,* p. 218 (*a*); *Allen v. Flood, ibid.,* Vol. 1, p. 33, para. 253.

SUPREME COURT. Auckland. 1937. October 7, 19. *Reed, J.*

COLONIAL AMMUNITION COMPANY LIMITED v. THE KING.

Currency—Contract—Construction—"Price equal to the current War Office cost" in England—Meaning of "equal."

A contract provided that the Crown, on purchasing ammunition from the suppliant should pay a "price equal to the current War Office cost, meaning thereby the current price for the time being paid by His Majesty's War Office to contractors for similar ammunition in England," plus certain increases (expressed in pounds, shillings, and pence).

The agreement after providing for an annual meeting of the representatives of both parties to the contract to ascertain the War Office cost, continued,

"the current War Office cost so ascertained (increased in the manner hereinbefore provided) shall be and be taken to be the price to be paid . . ."

Richmond, and **West,** for the suppliant; **Meredith** and **Smith,** for the respondent.

Held, That, upon the construction of the whole agreement, "equal" meant equality in numbers of the common unit of account, and the correct method of ascertaining the price was having first ascertained the number of pounds payable in London for the same quantity of ammunition, to take the same number of New Zealand pounds.

Solicitors: Jackson, Russell, Tunks, and West, Auckland, for the suppliant; **Crown Solicitor,** Auckland, for the respondent.

SUPREME COURT. Auckland. 1937. October 7. *Callan, J.*

COLGAN v. COLGAN.

Divorce and Matrimonial Causes—Alimony and Maintenance—Permanent Maintenance—Petitioner divorced on failure to comply with Order for Restitution of Conjugal Rights—Position of Wife guilty of Desertion—Whether cause of Desertion can be inquired into on Petition—Divorce and Matrimonial Causes Act, 1928, s. 33.

The position of a wife who has been divorced on the ground of her failure to comply with a decree for restitution of conjugal rights in regard to permanent maintenance is analagous to that of wives who have committed the matrimonial offence of adultery; and the question whether she had just cause to desert her husband cannot be raised on the hearing of a petition for permanent maintenance.

Semble, Before an order for permanent maintenance is made in favour of such a petitioner, the Court ought to require proof that she is totally without means and has no earning capacity or relatives who can support her.

Geange v. Geange, [1917] G.L.R. 512, and **Martin v. Martin,** [1923] G.L.R. 441, applied.

Counsel: Keith, for the petitioner (wife); **Hough,** for the respondent (husband).

Solicitors: Towle and Cooper, Auckland, for the petitioner; **C. W. E. Hough,** Auckland, for the respondent.

COURT OF APPEAL.
Wellington.
1937.
Sept. 28; Oct. 13.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

ROBERTSON v. MARTHA GOLD-MINING COMPANY (WAIHI), LIMITED.

Workers' Compensation—Average Weekly Earnings—Mining "Scout"—Method of Computation for Purposes of Compensation—Workers' Compensation Act, 1922, s. 63; Amendment Act, 1936, s. 7.

The decisions in *McConnell v. Waihi Gold-mining Co., Ltd.*, [1935] N.Z.L.R. s. 36, and in *Berryman v. Martha Gold-mining Co. (Waihi), Ltd.*, [1936] N.Z.L.R. 382, have been abrogated by s. 7 of the Workers' Compensation Amendment Act, 1936.

The plaintiff was a "scout" member of a party of contractors working for the defendant company—*viz.*, a person approved by that company, which permits scouts without further reference to it to be taken on to replace contract members of parties. He was not engaged by the party of contractors as a wages man, but was treated by them as thought he were a member of the party; and his earnings were proportionate to the net earnings of the party for the period during which he worked. At the material time, he was a person whose remuneration was fixed by reference to the amount of work done by him. He sustained injury by accident the day on which he commenced work with the party.

On case stated by the Judge of the Court of Arbitration for the opinion of the Court of Appeal as to the basis on which the average weekly earnings of the plaintiff should be calculated,

Sullivan, for the plaintiff; **Richmond,** for the defendant.

Held, That the plaintiff was entitled to have his compensation calculated in accordance with s. 7 (3) (*a*) of the Workers' Compensation Amendment Act, 1936, and that the amount of his weekly earnings must accordingly be ascertained in accordance with s. 7 (1) of that Act.

Solicitors: Sullivan and Winter, Auckland, for the plaintiff; **Buddle, Richmond, and Buddle,** Auckland, for the defendant.

COURT OF APPEAL.
Wellington.
1937.
March 5; Oct. 30.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

In re **HUME (COBB RIVER) ELECTRIC-POWER COMPANY, LIMITED.**

Company Law—Shares and Shareholders—Shares issued to defray Construction of Works, Buildings, or Provision of Plant—Payment of Interest out of Capital—Court's Sanction—Form of Order—Companies Act, 1933, s. 66—Court of Appeal Rules, R. 10.

Section 66 of the Companies Act, 1933, contemplates (*a*) that there may be more than one payment of interest out of capital sanctioned by the Court, and (*b*) that the company may apply for the sanction of the Court not only in respect of shares which, before the application, had been issued to the subscribers, but also in respect of shares which the company would issue in the future.

Certain shares having been proved to be shares issued for the purposes of raising money to defray the expenses of the construction of its company's works and buildings and the provision of the plant and the period for the completion of the works being estimated to extend to August 18, 1938, an order was made that the company might pay interest not exceeding 5 per cent. per annum on so much of the share capital as was for the time being paid upon the said shares for the period ending, either (*a*) with the close of the half-year next after the half-year during which the works or buildings had been actually completed or the plant provided, as required by s. 66 (1) (*d*) of the Companies Act, 1933, or (*b*) on August 18, 1938, whichever of these dates should be the earlier; and the company was authorized to charge the sum so paid by way of interest to capital as part of the cost of construction of the work or building or the provision of plant.

Order granted on an application made under R. 10 of the Court of Appeal Rules, which had been refused as premature by *Northcroft, J.*, as reported in [1936] N.Z.L.R. 946.

Counsel: Hensley, *in support.*

Solicitors: Livingstone and Hensley, Christchurch, for the applicant.

COURT OF APPEAL.
Wellington.
1937.
Sept. 30; Oct. 13.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

COMMERCIAL UNION INSURANCE COMPANY, LIMITED v. COLONIAL CARRYING COMPANY OF NEW ZEALAND, LIMITED.

Insurance — Motor-vehicles Insurance (Third-party Risks) — —Injury by Crate falling while being wheeled on Hand-trolley on Tray of Stationary Motor-lorry—Whether Injury "sustained or caused by or through or in connection with the use of" a Motor-vehicle—Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 6.

Bodily injury caused by the driver of a stationary motor-lorry in dropping upon a person on the footpath a crate that he was wheeling on a hand-trolley on the tray of the lorry is not the result of an accident "sustained or caused by or through or in connection with the use" of a motor-vehicle, within the meaning of s. 6 (1) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928.

A.P.A. Union Assurance Society v. Ritchie and Barton Ginger and Co., Ltd., [1937] N.Z.L.R. 414, distinguished.

Counsel: Leicester, for the plaintiff; **O'Leary, K.C., and Sladden,** for the defendant.

Solicitors: Leicester, Jowett, and Rainey, Wellington, for the plaintiff; **Sladden and Stewart,** Wellington, for the defendant.

COURT OF APPEAL.
Wellington.
1937.
Sept. 17, 20;
Oct. 13.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

TIPENE v. TUTUA TEONE.

Adoption of Children—Written Order signed by Magistrate essential for valid Adoption—Infants Act, 1908, s. 17 (re-enacting the Adoption of Children Act, 1895, ss. 4, 7)—Adoption Rules (1895, New Zealand Gazette, **1839, R. 12).**

Section 4 of the Adoption of Children Act, 1895 (re-enacted as s. 17 of the Infants Act, 1908) provided that on the application in writing in the prescribed form, to a Judge by the persons or person therein mentioned,

"an order of adoption of a male child may be made by the Judge in favour of the applicant, in the prescribed form and subject to the provisions of this Act."

On appeal from a declaratory order of *Reed*, J., reported [1936] N.Z.L.R. 642,

Neal, for the appellant; **Spratt** and **A. R. Perry,** for the respondent.

Held, dismissing the appeal, That the statute and the rules made thereunder require a written order signed by the Magistrate making it, as essential to the making of a valid order of adoption, and that an oral decision of a Magistrate to grant the order—evidenced by minutes on the application and in the Court minute, both bearing the Magistrate's initials but the whole (including the initials) written by the Clerk of the Court—was inoperative as an order of adoption under the statute.

Lockhart v. Mayor, &c., of St. Albans, (1888) 21 Q.B.D. 188; **Ex parte Weir, In re Weir,** (1871) L.R. 6 Ch. 875 and **Hills v. Stanford,** (1904) 23 N.Z.L.R. 361, applied.

The judgment of *Reed*, J., [1936] N.Z.L.R. 642, was affirmed.

Solicitors: Levi, Yaldwyn, and Neal, Wellington, for the appellant; **Morison, Spratt, Morison, and Taylor,** Wellington, for the respondent.

Case Annotation: *Lockhart v. Mayor, &c., of St. Albans,* E. & E. Digest, Vol. 33, p. 411, para. 1217.

SUPREME COURT. Wellington. 1937. Oct. 21. *Myers, C.J.*

In re **HORIANA KINGI (DECEASED) THOMPSON v. ERUETI TAMAHAU KINGI.**

Adoption of Children—Devolution of Property of Adopting Parents—Under "Deed, will or instrument prior to the date of such order of adoption"—Construction—Infants Acts, 1908, s. 21 (1) (*a*).

The words "prior to the date of such order of adoption" in para. (*a*) of the proviso to s. 21 (1) of the Infants Act, 1908, which is as follows:

"Provided that such adopted child shall not by such adoption—

"(*a*) Acquire any right, title, or interest in any property which would devolve on any child of the adopting parent by virtue of any deed, will, or instrument *prior to the date of such adoption*, unless it is expressly stated in such deed, will, or instrument . . . "

are adjectival words qualifying "deed, will, or instrument"; and the proviso, when it speaks of a deed, will, or instrument, prior to the date of adoption, refers to priority in date as between the deed, will, or instrument, and the order of adoption.

In re Taylor, Public Trustee v. Lambert, [1932] N.Z.L.R. 1077, and **In re A Deed of Trust, Peddle v. Beattie,** [1933] N.Z.L.R. 696, considered, and on this point, applied.

Quaere, Whether "lawful issue" includes an adopted child.

Dictum in **In re A Deed of Trust, Peddle v. Beattie,** [1933] N.Z.L.R. 696, 704, ll. 8-12, referred to.

Counsel: J. F. Thompson, as plaintiff; **S. A. Wiren** for Tamahau Kingi, on his own behalf, and as representing the estate of Hamuera Tamahau Kingi deceased; **A. T. Young,** for the Native Trustee, as administrator with the will annexed of Erueti Takana Kingi and as trustee of James Ross; **Hay,** for the Native Trustee as trustee of Rumatiki Erueti Parker (or Kingi) the adopted child of Erueti Takana Kingi and a mental patient; **Clere,** for Puta te Apatu, as executrix of the will of Tina Kowhai Renata.

Solicitors: J. F. Thompson, Greytown, for the estate of Horiana Kingi, deceased; **S. A. Wiren,** Wellington, for Erueti Tamahau Kingi; **Young, Courtnay, Bennett, and Virtue,** Wellington, for the Native Trustee, as administrator of estate of Erueti Takana Kingi, and as trustee of James Ross; **Mazengarb, Hay, and Macalister,** Wellington, for the Native Trustee, as trustee of Rumatiki Erueti Parker (or Kingi); and **Turton and Tully,** Greytown, for Puta te Apatu.

COURT OF APPEAL. Wellington. 1937. Oct. 5; Nov. 12. *Myers, C.J.* *Smith, J.* *Fair, J.*

WILSON v. CARDIFF CO-OPERATIVE DAIRY COMPANY, LIMITED.

Industrial Conciliation and Arbitration—Factories—Industrial Agreement coming into operation on September 15, 1934—Whether "in substitution or replacement of" expired Award in force on May 29, 1931 and cancelled as from November 27, 1932—Common-law Relationship of Master and Servant intervening—"Rates of remuneration"—"Special payments"—"Holiday"—When Right to Holiday Pay arises—Finance Act, 1936, ss. 14, 15, 47—Factories Amendment Act, 1936, s. 4 (3)—Order in Council (1936 New Zealand Gazette, **1585: 2/1936), Second Schedule.**

The test of "replacement" and "substitution," where those words are used in s. 15 (3) of the Finance Act, 1936, lies in the fact of succession by industrial agreement or award of the general type permitted by the statute, whether with or without the intervention of a common-law relationship between employer and employed. The words "substitution" and "replacement," when applied to awards and industrial agreements, imply no more than is implied in the various phrases previously used in the industrial legislation to describe the succession of one award or agreement upon another.

Kinsman v. Purity Bread Co., Ltd.: Kinsman v. Denhard Bakeries, Ltd., [1937] N.Z.L.R. 64, 36 Bk. of Awards, 1428, doubted.

So held by the Court of Appeal (*Smith* and *Fair*, JJ., *Myers*, C.J., dissenting) on the first question submitted by the Court of Arbitration on a case stated for the opinion of the Court of Appeal.

Held further, per *totam Curiam*, That s. 15 (3) of the Finance Act, 1936, does not purport to confer on any worker any right to a holiday, and, consequently, a claim that a worker is entitled to a rate of remuneration in lieu thereof cannot arise under the subsection.

For the reasons,

Per *Myers*, C.J., That the words "special payments" in the definition of "rates of remuneration" in s. 14 of the Finance Act, 1936, apply to remuneration in money and not to any concessions or extraneous benefits conferred on the worker by the cancelled award or industrial agreement which are conditions of employment, and not rates of remuneration: the words "and other special payments" in the definition of "rates of remuneration" must be construed as being *ejusdem generis* with wages and overtime.

Per *Smith*, J., That a holiday, as such, is not a right of remuneration as defined in Part II of the Finance Act, 1936. It is not wages or overtime or any other form of special payment: it is a period of leisure for which an alternative, in the shape of rates of payment, may be provided; but, until the right to the holiday itself is conferred, no right to the payment in lieu thereof arises.

Counsel: Solicitor-General (Cornish, K.C.), for the appellant; **J. F. B. Stevenson,** for the respondent.

Solicitors: Crown Law Office, Wellington, for the appellant; **Izard, Weston, Stevenson, and Castle,** Wellington, for the respondent.

FULL COURT. Wellington. 1937. Oct. 6 13. *Myers, C.J.* *Ostler, J.* *Smith, J.* *Fair, J.*

WELLINGTON CITY CORPORATION v. KINSMAN (INSPECTOR OF FACTORIES).

Factories Acts—"Handicraft"—Whether Skill involved—"Preparing or manufacturing goods for trade"—Whether Building for Maintenance and Running-repairs of Tram-cars constitutes "preparing"—"Factory"—Effect of Operation of a Factory in adjacent Buildings—Factories Act, 1921–22, ss. 2, 64.

The definition of "factory" contained in s. 2 of the Factories Act, 1921–22, so far as is relevant is as follows:—

"Any building . . . in which one or more persons are employed . . . in any handicraft or in preparing or manufacturing goods for trade or sale, and includes any building . . . in which work as is ordinarily performed *in a factory is performed for or on behalf of any local authority* whether for trade or sale or not."

Section 64 of the statute provides:

"Where the operations of a factory are carried on in several adjacent buildings . . . all of them shall be included as one and the same factory, notwithstanding that they may in fact be separated or intersected by a road, street, or stream . . . "

The appellant Corporation had a workshop at Kilbirnie, which came within the definition of a factory and was registered as such, and in which the work of manufacturing and equipping cars before they were placed on the road and all major repairs were done. Adjoining the workshop and separated from it merely by a wall, in which there were two doors was a car-shed in which tram-cars were housed when not in use, and while so housed were inspected, cleaned, and oiled, and any incidental running adjustments needed were done at night. Such work did not involve skill. A Magistrate held that such tram-shed was a "factory" within the above definition and that double rates of pay should be paid to a worker employed in the tram-shed on a Sunday.

On appeal from a conviction for an alleged breach of s. 15 of the Factories Amendment Act, 1936,

Weston, K.C., and **Marshall,** for the appellant; **C. H. Taylor,** for the respondent.

Held, per *totam Curiam*, allowing the appeal, 1. That the term "handicraft" involves skilled manual labour and, therefore, no one was employed in "handicraft" in the car-shed.

Armstrong v. Maxwell, (1895) 13 N.Z.L.R. 636, approved.

2. That the phrase "preparing goods for trade or sale" does not include maintenance work or repairs for the purpose of merely enabling an article previously put into commission to be continued in use, and, therefore, no one was employed in "preparing goods for trade or sale" in the car-shed.

Semble, per *Myers* C.J., and *Smith*, J., the words "trade" and "sale" are words *ejusdem generis.*

3. That s. 64 did not apply, as none of the operations of a factory was carried on in the car-shed.

Henry Bull and Co., Ltd. v. Holden, (1912) 13 C.L.R. 569, and **Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.,** [1914] V.L.R. 321, applied.

Keddie v. South Canterbury Dairy Co., Ltd., (1907) 26 N.Z.L.R. 522, distinguished.

Potteries Electric Traction Co., Ltd. v. Bailey, [1931] A.C. 151, and **In re Kelburn and Karori Tramway Co.,** (1936) 36 Bk. of Awards, 493, referred to.

Solicitors: City Solicitor, Wellington, for the appellant; **Crown Law Office,** Wellington, for the respondent.

Case Annotation: *Henry Bull and Co., Ltd. v. Holden,* E. & E. Digest, Vol. 24, p. 897, 1 (*b*).

SUPREME COURT. Wanganui. 1937. Nov. 4, 8. *Myers, C.J.*

McGREGOR (INSPECTOR OF FACTORIES) v. WANGANUI ABATTOIR COMPANY, LTD.

McGREGOR (INSPECTOR OF FACTORIES) v. COULSTON AND RODERICK.

Factories Acts—Abattoir—"Municipal Abattoirs"—Interpretation—Including Abattoir established and operated by Delegate—Slaughtering and Inspection Act, 1908, ss. 2, 5, 15—Finance Act, 1936, s. 47 (1)—Order in Council (1936 New Zealand Gazette, **1585: 2/1936), cl. 14—Factories Act, 1921-22—Amendment Act, 1936, ss. 4, 14, 15.**

The term "municipal abattoir" includes not only an "abattoir" established and actually controlled and operated by the local authority of a municipality under s. 5 of the Slaughtering and Inspection Act, 1908, but also an abattoir established and operated by a delegate under s. 15 of that Act.

Counsel: Bain, for the appellant; **Barton,** for the respondent.

Solicitors: N. R. Bain, Crown Solicitor, Wanganui, for the appellant; **Armstrong and Barton,** Wanganui, for the respondents.

FULL COURT. Wellington. 1937. Sept. 20, 21; Oct. 13. *Myers, C.J. Ostler, J. Smith, J. Fair, J.*

COOPER v. FROST.

Trade Name—Dental Practice—Use of Abbreviation of own Name causing Deception—Agreement between Vendor and Purchaser of Dental Practice that Vendor would carry on Practice in Name "H. W. Frost"—Contract—Goodwill—Implication of Negative Agreement not to use any other Name.

Defendant, H. W. Frost, having carried on business in Wellington as a dentist under the name of "Frost and Frost," sold his practice to a private company called "Frosts Limited," in which he, the plaintiff and H., both of them former employees of his, each had a third of the shares. Thereafter defendant practised in Auckland and the company in Wellington where it was extensively advertised under the name of "Frost and Frost." Disputes having arisen between the parties, litigation was settled by a compromise. An agreement between the defendant, H., and the plaintiff, and the company, was executed by the parties on May 23, 1934. It provided for a sale of defendant's shares to the other two members, called the "purchasing members," and for the payment of the purchase price and other sums within a period of three years and one month from April, 1934. The agreement contained the following clause

"11. Without prejudice to the right of any party hereto in any circumstances which may arise to bring an action against any other party hereto in respect of 'passing off' by any such other party, the vendor member shall carry on the practice of dentistry in Wellington under the name 'H. W. Frost,' and the company and/or the purchasing members or either of them may for the period of three years and one month from the first day of April one thousand nine hundred and thirty-four carry on the practice of dentistry in Wellington under the name of 'Frost and Frost' and/or 'Frosts Limited': Provided always—

"(*a*) That the use of the names 'Frost and Frost' and/or 'Frosts Limited' by the company and/or by the purchasing member or either of them during the said period of three years and one month shall not of itself be actionable:

"(*b*) That neither the company nor the purchasing members nor either of them may carry on the practice of dentistry under the name 'Frost and Frost' or 'Frosts Limited' or under any style or firm name containing the name 'Frost' after the expiration of the said period of three years and one month:

"(*c*) That all existing signs erected at Wellington premises as at the 14th day of May, 1934, may remain throughout the said period of three years and one month; and

"(*d*) That nothing in this clause shall be deemed an admission by any party hereto that he has heretofore been guilty of 'passing off'."

By cl. 13 the executors, administrators, and assigns of the vendor and of the purchasing members and the successors and assigns of the company were all bound.

In January, 1937, the company went into liquidation. H. sold his shares to the plaintiff, who bought from the liquidator the company's assets, including the goodwill of its business and the trade names used in connection therewith, subject to the agreement of May 23, 1934. Plaintiff carried on the business under the name of "Frost and Frost" down to May 1, 1937, after which he carried on the business under his proper name of C. F. Cooper, including in the advertisements the words "late of Frost and Frost" until threatened with legal action by the defendant, when he discontinued their use.

Defendant, since the expiry of the agreement, freely used in advertisements the name "Frosts" "Frost," and "Frost and Frost," and on some occasions advertised himself as conducting "the only and original dental business of Frost and Frost."

On appeal from *Reed*, J., who had granted an interim injunction restraining defendant from the use of the name "Frost and Frost" or any intimation that defendant's dental practice was the same as, or a continuation of, any dental practice formerly carried on by defendant or by Frosts Limited, or by the plaintiff.

S. A. Wiren, for the defendant, in support of motion; **Keesing,** for the plaintiff, to oppose.

Held, per *totam Curiam,* 1. That the stipulation in the said cl. 11 that defendant should carry on his new practice in Wellington under the name of H. W. Frost implied a negative agreement not to carry on such business in any other name than H. W. Frost.

2. That the plaintiff was entitled to the interim injunction granted by *Reed*, J., but enlarged so as to enjoin the defendant from using the trade names "Frosts" and "Frost."

Held, further, by *Myers*, C.J., and *Ostler* and *Fair*, JJ., 1. That a dental practice so extensively advertised under a trade name had a goodwill value under that name.

2. That in using the words "Frost and Frost" "Frosts" and "Frost" defendant was not carrying on business under his own name *simpliciter,* but was using it in such a special manner as to produce confusion.

3. That the defendant having sold the goodwill of the business including the right to use the trade name, could not, in the absence of a special agreement, be allowed to use the name, the right to which he had sold.

4. That the plaintiff still had a *locus standi* to complain of the unlawful use of the trade name of the defendant.

Owen v. Rayner, (1905) 25 N.Z.L.R. 168, 175, mentioned.

J. J. Craig, Ltd. v. Craig, [1922] N.Z.L.R. 199; **Trego v. Hunt,** [1896] A.C. 7; **Singer Manufacturing Co. v. Loog,** (1882) 8 App. Cas. 15; **"Independent" Newspapers, Ltd. v. "Irish Press,"** [1932] I.R. 615, applied.

Beazley v. Soares, (1882) 22 Ch.D. 660, distinguished.

Solicitors: P. Keesing, Wellington, for the plaintiff; **Luckie, Wiren, and Kennard,** Wellington, for the defendant.

Case Annotation: *Trego v. Hunt,* E. & E. Digest, Vol. 43, p. 9, para. 44; *Beazley v. Soares, ibid.,* p. 318, para. 1394; *Singer Manufacturing Co. v. Loog, ibid.,* p. 225, para. 686.

The New Arbitration Court Judge.

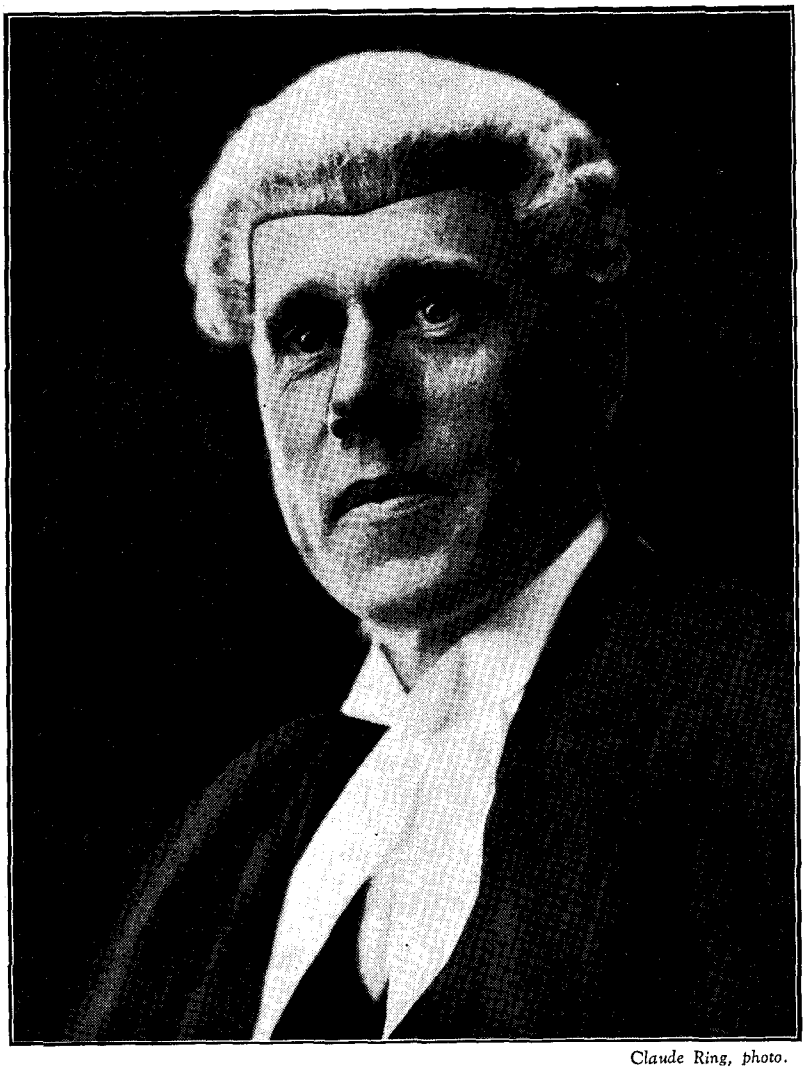
MR. W. J. HUNTER APPOINTED.

In pursuance of the Industrial Conciliation and Arbitration Amendments Acts (Nos. 2 and 3) of the present session of Parliament, Mr. W. J. Hunter, LL.B., of Christchurch, has become Judge of the Second Court of Arbitration, and has commenced his duties at Auckland, where there are arrears of work to be dealt with.

The new Judge is the second son of Mr. Thomas Hunter of Elie, Fifeshire, Scotland, who arrived in New Zealand in the early 'seventies, and he was born in Christchurch. At an early age he entered upon a course of five years' training for the teaching profession, and held various teaching positions, including the headmastership of the Mangapapa School, Gisborne.

He obtained his Bachelor of Laws degree, and was also winner, in 1900, of the Macmillan Brown Prize of the University of New Zealand for English essay.

He was admitted by Mr. Justice Chapman, at Gisborne, in 1906. He then practised for a short time at Levin; but, on the death of the late Mr. Philip Kippenberger, he accepted a position as common-law clerk to the firm of Messrs. Kippenberger and Franks, in order to gain wider experience. Admitted as a partner a year or two later, he quickly developed a practice as an advocate, his first important case being the defence of Arthur Roberts for murder of a girl in a Christchurch restaurant. The case was heard before the late Mr. Justice Denniston who, in his summing-up to the jury, commended the conduct of the defence. This was the beginning of an extensive practice in the Criminal Courts, another important case of his being the defence of Eggers for murder, in 1915. The facts of the latter case were that officials of the State mine near Greymouth were taking some £3,000 in gold, silver, and copper from the bank in Greymouth to the mine to pay the men's wages; at a lonely spot in the bush they were held up by a masked and armed highwayman, and two of the men were fatally shot, and the third man escaped wounded. The Crown built up a very strong case against the accused Eggers, and, no real defence being possible, Eggers was duly convicted and hanged.



Claude Ring, photo.

Mr. Justice Hunter.

Early in his career, the new Judge attracted the attention of representatives of labour organizations and developed what subsequently became a large practice in workers' compensation and industrial law. He was legal adviser to some of the largest bodies of organized labour in New Zealand, and he acted for the Christchurch Tramwaymen's Union for over twenty-five years. On its behalf, he conducted many appeals before the Tramway Board of Appeal. However, he did not confine his attention exclusively to Court work but made himself conversant with conveyancing and the conduct of legal business generally. When appointed to the Court of Arbitration he was chairman of No. 1 Christchurch City Mortgage Commission.

In the course of his practice, he has had three partners: Mr. C. H. Franks, who retired in 1916; Mr. Eric Lyon, who was killed in action in France during the War; and Mr. R. L. Ronaldson. For the past ten years the practice has been carried on under the name of "Hunter and Ronaldson."

The new Judge formerly was active in the work of the Canterbury Law Society, being for a number of years its honorary Secretary; and, subsequently, he served as President for two years. During the latter time he presented a cup to the Canterbury District Law Society to be competed for annually by members of the profession in Canterbury at a golf competition. This has become an annual fixture, and it is looked forward to and thoroughly enjoyed by members of the profession in Canterbury. He, himself, however, makes no claim to be anything more than an average golfer.

In 1928, being then a delegate to the New Zealand Law Society, he pressed the question of the legal pro-

fession holding an annual conference. No great enthusiasm was displayed at first; but, as the matter had originated in Canterbury, it was left to Canterbury practitioners to hold the first Conference at Christchurch. It proved to be a great success, the deliberations being held in the historic Provincial Council Chamber in Christchurch. Since then Dominion Legal Conferences have been held at Auckland, Wellington, and Dunedin; and the next one will be held at Christchurch, at Easter of next year. The new Judge may be called the "father" of these important gatherings of the members of the profession throughout the Dominion.

The JOURNAL wishes the new Judge every success in his important new duties, in the course of which, as will be seen on another page, he will preside over the Second Court of Arbitration.

Trusts under Insurance Policies.

Accident Policies.

The Married Women's Property Act, 1908, s. 16 (2), provides that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife or children, shall create a trust in favour of the objects named. The result is (as the section further provides) that the moneys payable under any such policy shall not form part of the estate of the insured, or be subject to his debts.

The question whether an accident policy is "a policy of assurance effected by a man on his own life" within the meaning of the above section was considered in *Re Gladitz*; *Guaranty Executor and Trustee Co., Ltd.* v. *Gladitz*, [1937] 3 All E.R. 173. The deceased had taken out a Lloyd's accident policy providing for payment of £15,000 on death, and a memorandum stated that all claims should be payable to the wife of the assured, if living. The case for the administrator of the estate was that the memorandum did not bring the policy within the above section. Even though the insured had paid all the premiums, no trust was created, and his next-of-kin were entitled to share in the proceeds.

Bennett, J., observed that two questions arose. The first was whether the policy was effected by the deceased on his life, and it was held that, as the policy provided for a payment on death, it was not excluded from the section by the circumstance that provision was also made for payment on a number of other events. The second question was whether the above memorandum meant that the policy was "expressed to be for the benefit of the wife." Apart from authority, the learned Judge would have been doubtful whether the memorandum was a sufficient expression of intention that the policy was for the benefit of the person to whom moneys were to be paid. It was held, however, that the policy was expressed to be for the benefit of the widow, within the above section, and she was therefore solely and beneficially entitled to the moneys payable by the underwriters.

This question had previously arisen in regard to life policies, as in *Re Fleetwood's Policy*, [1926] Ch. 48. The assured had taken out a life policy for £500, which the company agreed to pay to his wife, or, in the event of her prior death, to the insured's executors, administrators or assigns. At the end of twenty years the insured had an option to be paid in cash, which he exercised, but the company required a joint receipt from the insured and his wife. As they had then been separated for some years, the insured contended that the trust in his wife's favour was no longer subsisting. The wife's case was that the trust in her favour could not be annulled, and, as the exercise of the option had accelerated the payment, she was entitled to the amount forthwith. Tomlin, J. (as he then was), held that the policy was within the section of the English Statute corresponding to s. 16 (2) of the New Zealand Act, in spite of the fact that it was for the benefit of the wife in certain events only. The option had therefore been exercised for the benefit of the trust, and (in default of agreement) the money was directed to accumulate in Court until such time as the death of either party might show which of them was entitled to it.

An example of a case in which a trust was not created occurred in *Re Englebach's Estate*, [1924] 2 Ch. 348. The testator had signed a proposal form in his name, adding "for his daughter, Mary Noel, aged one month." The company thereupon issued an endowment policy for the payment of £3,000 on the daughter's twenty-first birthday, if she should so long live. The testator died before the maturity of the policy, and his residuary legatees contended that there was no declaration of trust for the daughter, as the direction to pay the amount to her was a mere mandate, which was revoked by the testator's death. The daughter's contention was that the endowment policy was obviously meant as a provision for her, and the case was therefore distinguishable from those relating to life policies. Romer, J. (as he then was), held that the daughter could not have enforced the claim in her own name against the insurance company, as she was a stranger to the contract. The mere fact that the policy-moneys were payable to somebody other than the assured did not make him a trustee for the person nominated to receive the amount. The method of signature of the proposal form also did not imply that the assured was making the whole contract on behalf of his daughter. The result was that the policy-moneys formed part of the estate of the father, and were payable to the trustees of his will.

A Warrant Against Gladstone.—Among the people who habitually frequent the Law Courts are some who are eccentric, to say the best of it. One old lady used to haunt the Lord Chief Justice's Court in the days of Lord Russell of Killowen. She used to ask for a warrant against Mr. Gladstone for attempting to poison her, and she would produce a bottle of dirty water as evidence. In his *Memories of a K.C.'s Clerk*, Mr. Francis Pearson recalls the circumstances:

> Russell of Killowen, an Irish gentleman to the finger-tips, would courteously inform her that warrants against Mr. Gladstone were not being issued on that particular day, and that the application would have to be renewed on some future occasion.
>
> Whereat the old lady would bow most gracefully and murmur, in the best professional manner, "If your Lordship pleases." Russell of Killowen would return the bow, and the old lady would rustle importantly from the Court.

But when she tried Lord Russell's successor, Lord Alverstone, she was ordered out of Court. So she threw the bottle at him!

The Off-side Rule.

4.—Is there Absolute Liability for its Breach ?

(*Concluded from p. 305*).

The question asked in the sub-title of this article must be answered in the negative until such time as the judgment of the Court of Appeal in *Algie v. D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, is overruled. Whether the Court will regard the judgment as binding until the Judicial Committee decides otherwise, remains to be seen; but, for reasons presently to be given, it may possibly disregard the opinion expressed in the joint judgment of Reed, Ostler, and Smith, JJ., delivered by Reed, J.

The plaintiff in that case was riding a motor-cycle alongside and to the left of a tram-car as both vehicles proceeded across an intersection. The tram-car had the right of road against all vehicles, from whichever direction they might have been proceeding. The defendant's motor-car approached the intersection from the right of the tram-car and attempted to pass in front of it. The motorman promptly applied the brakes and the tram pulled up suddenly. That caused the plaintiff to go slightly ahead of the tram-car. The defendant's car passed in front of the tram, collided with the motor-cycle and injured the plaintiff.

The jury found for the plaintiff on the general issue of negligence, but the trial Judge, Adams, J., entered judgment for the defendant on the ground that the plaintiff had proceeded across the intersection in breach of the rule and was therefore disqualified from recovering compensation for the harm he sustained. Adams, J., followed the dictum of Salmond, J., in *Canning v. The King*, [1924] N.Z.L.R. 118, 127, where he said:

> He who, without some proved justification, disobeys any such regulation and thereby causes an accident is liable as for negligence for the harm which he thereby inflicts on others and is disqualified as by contributory negligence from recovering compensation for any harm which he thereby brings upon himself.

In applying this dictum Adams, J., said:

> I entirely agree with this statement and need only add that, as in that case, so here, there is no question of any inevitable mistake, inevitable accident, necessity or other special justification, which alone would exonerate the plaintiff from a finding of negligence. Subject to this, the statutory rule is absolute.

All the Judges in the Court of Appeal agreed with Adams, J., that the defendant's driver had committed a breach of the regulations by failing to give way to the tram-car; that was made clear by Reed, J., who said:

> The defendant's driver, in breach of the regulation dashed across in front of the tram-car and so close as to demand the instant application of its brakes, with the result that the plaintiff forged ahead a few feet and was struck by the defendant's car. The jury find that in such circumstances that the plaintiff was not negligent. We think that, as reasonable men, they were entitled to so find.

The plaintiff, therefore, was crossing the intersection at a time when no vehicle approaching from his right could lawfully cross*, and the Court may well consider that as the case might have been decided on that ground, it is free to consider afresh the substantive question, "Does a breach of the off-side rule involve absolute liability for any damage resulting from it?"

Myers, C.J., delivered a separate judgment in *Algie's* case, but did not deal with this question beyond a reference to the grounds of the trial Judge's decision. In discussing the tram-car having the right of road the learned Chief Justice said:

> It would have the right of road provided there existed the condition mentioned in subcl. 13 (now para. 6 of Reg. No. 14), that is to say, that if both continued on their course there would be a possibility of a collision. But even so, that condition may depend upon various matters—such as for example, the speed of the respective vehicles—and those are matters that have to be determined by the jury.

This expression of opinion indicates that the only condition precedent to the application of the rule is a finding of fact as to the possibility of collision. Although Myers, C.J., purported to base his judgment on the ground that the accident was caused by the sole negligence of the defendant's driver, he inferentially held that the rule did not apply to the plaintiff because the defendant's car was not *lawfully* approaching from the right.

The majority judgment however, is specific on the effect of a breach of the rule:

> Although, no doubt, a breach of the regulation raises a presumption of negligence, it is still a question for the jury, as to whether in all the circumstances there was negligence.

That was a step forward from the opinion expressed in *Black v. Macfarlane*, [1929] G.L.R. 524, by Smith, J., who at p. 528, said:

> If he [the driver] was not guilty (of a wilful or negligent breach of the off-side rule) then a breach of that rule if it did occur, cannot be relied upon as *prima facie* evidence of negligence, and the rights of the parties must be determined solely upon the ordinary principles of liability for negligence.

The majority of the Judges in *Algie's* case considered that the rule presupposes that traffic coming from the right should be seen or ought to have been seen, and that a breach of the regulation was either a voluntary or negligent act.† In short, this interpretation of the rule means that the driver of a motor-vehicle is liable to a penalty for a breach, unless he can prove that something intervened over which he had no control and which he did not create, directly or indirectly, and so frustrated his attempt to stop or slow down in order to give way to vehicles approaching from his right.

Their Honours then gave two illustrations of cases where a breach of the rule would not raise even a presumption of negligence.

> (i) "Supposing a motor-car is proceeding at a reasonable rate along a narrow street and another car dashes out suddenly from the right from an intersecting street and the cars collide; is the bare fact that the first mentioned did not give way, evidence of negligence? Clearly not."

This illustration is apparently meant to afford an exception to the principle already laid down in the

* "A reasonable construction of the rule is that it applies to vehicles *lawfully* approaching an intersection from a driver's right": see p. 293, *ante*.

† Commenting on this at p. 293, *ante*, it was said: "This is a fair and commonsense construction of the rule. If a motorist stops or slows down on approaching an intersection for the purpose of giving way, but another vehicle following in his wake, runs into and pushes his vehicle on to the intersection, his breach of the rule is neither a voluntary nor a negligent act. If he attempts to give way but is unable to do so because the brakes of his vehicle are not in order or his speed is too great, the breach is not a voluntary act but a negligent act."

judgment, that "a breach of the regulation raises a presumption of negligence." If so, there would be little, if any, limit to the number of exceptions; indeed, the true purpose and intent of the rule would be destroyed.

It is suggested, however, that if the car in the narrow street had been proceeding at a *reasonable speed, having regard to all the circumstances*, the driver could have observed the off-side rule and the collision could not then have taken place.

If the street was so narrow that the driver could not see along the intersecting street until he was in line with the buildings, his duty was to bring his vehicle to a stop in order to ascertain what vehicles (if any) were approaching from his right.

The hypothetical case mentioned by Reed, J., is the normal everyday case of the driver who appears before the Lower Courts charged with the breach of the regulation or is sued for damages caused by a collision on an intersection. The reason is obvious. It is now agreed that the period of reaction for the normal person is at least half a second; that means that a motor-vehicle travelling at fifteen miles an hour would travel 11¼ ft. before the driver applied his brakes and probably another 10 ft. before the vehicle came to a stop, which in ordinary cases means that it would come on to or cross the course of the other vehicle. Indeed, no driver who takes his vehicle on to a "built up" intersection, except from a very wide street, has any chance of complying with the rule if his speed exceeds five miles an hour; that is after making allowance for the extra view he has by reason of the footpath along the street he is about to cross.

The rule is mandatory; and unless so regarded by the Courts will lose its beneficial or remedial effect. A driver approaching an "X" intersection should be free to watch the traffic approaching from his right, secure in the knowledge that no driver of any vehicle approaching from his left will come on to the intersection in front of him if there is any possibility of a collision. That course of conduct has been prescribed by the Legislature, and it is unfortunate that the Court of Appeal has intimated that a person who fails to follow such a course may escape civil liability for his default.

> (ii) "Again assuming that there are two lines of traffic and a car coming out from behind another car on the down stream of traffic collides from the right with a car on the up stream, is that evidence of negligence on the part of the latter car? Clearly the bare fact that the latter car did not give way, the driver being unaware of the approach of the colliding car, raises no inference of negligence."

It must be assumed that the learned Judge is referring to the case of a car moving out from a line of traffic for the purpose turning into a street on its right, and, in doing so, has to pass across a line of traffic coming in the opposite direction‡. If he means that the driver turns to the right suddenly and without warning and drives in front of a vehicle which he knows or ought to know cannot pull up before a collision occurs, no question of liability can arise, because the principle relating to "self-inflicted" injuries applies. But if he means that the rule would not give the right of road to a driver, who after giving the proper signal makes a turn to the right in strict compliance with para. (5) of Reg. No. 14, merely because the oncoming driver did not see the signal or the turn to the right of the other vehicle, an impossible situation has been created.

Enough has now been said of the majority judgment in *Algie's* case and the unsatisfactory state in which it has left the law relating to the off-side rule, and the general question asked in the sub-title will now be discussed.

The breach of a statutory duty may or may not give a right of action independently of negligence. The principle laid down in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B., 832, 841, is that a breach of a statutory duty does not give rise to a civil action for damages if the duty was imposed for the benefit of the public generally and not for any particular class, and a penalty has been prescribed for the breach. This principle was approved by the Court of Appeal but distinguished in *Dominion Air Lines, Ltd. v. Strand*, [1933] N.Z.L.R. 1. *Phillips's* case came under review in *Monk v. Warby*, [1935] 1 K.B. 75, in which it was held that where a person uninsured against third-party risks is permitted by the owner to use a car, and injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured person. Greer, L.J., adopted the wider view expressed by Atkin, L.J., namely, "the duty may be of such paramount importance that it is owed to all the public." Commenting on this, Greer, L.J., said:

> "What therefore has to be considered here is, taking the whole of this Act, is there anything in it to show that an injured person is outside its scope? I am satisfied that there is not; and a person who suffers by reason of a breach of the [section] can maintain an action for that breach."

The recent case of *Bailey v. Geddes*, [1937] 3 All E.R. 671, throws considerable light on the subject now under review. In that case, two foot-passengers who were on the North side of the road had to cross the entrance to Bowman's Place in London in order to reach a "Belisha Crossing." When they reached the "Crossing" their view was obstructed for a time owing to a tram and a bus passing in opposite directions. The pedestrians emerged from behind the two vehicles and continued on without looking to see whether the road was clear. One of them was struck by the defendant's motor-car and claimed damages for the injuries he received. The Court of Appeal held that the defendant's liability was absolute, and the plea of contributory negligence could not be raised.

If *Bailey v. Geddes* has been decided correctly, the same result must follow a breach of the off-side rule. The wording of paras. (3) and (4) of the Pedestrian Places (Traffic) Provisional Regulations, 1935, under which a pedestrian is given the right of road across a "Belisha Crossing" is not more mandatory in its effect than the language used in para. (6), Reg. No. 14, of the Traffic Regulations (New Zealand).

The object of para. (6) is to lay down a course of conduct by drivers on approaching an intersection, so that each will know who has the right of way; in other words each will know the direction in which to look to ascertain that his vehicle may pass over the intersection in safety. If the manifest object of the rule is to be achieved, the civil and criminal liability of the driver who does not observe it, must be absolute, unless his failure was caused by the intervention of something over which he had no control and which he was not instrumental, directly or indirectly, in creating.

‡ This manoeuvre was referred to in the last part of this article; see second paragraph, second column, p. 304, *ante*.

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE No. 93. Appeal by a first mortgagee against an order of a Commission discharging from his "guarantee" the original mortgagor who borrowed upon first mortgage in 1919 from the mortgagee. It was established the mortgagee relied mainly upon the personal covenant. The "guarantor" sold the mortgaged property, and, as part payment, accepted a second mortgage; and the first mortgagee then released part of the security at the second mortgagee's request.

Held, That, allowing the appeal, the order of the Commission be reversed, and the "guarantor's" application for adjustment be dismissed, with the result that the original borrower remained liable.

CASE No. 94. Appeal by a first mortgagee, a very old lady, against an order of a Commission extending the term of the mortgage for ten years, with a right of extension for a further ten years, and discharging the original mortgagors from personal liability.

Held, allowing the appeal, That the order be varied by making the term of the mortgage seven years in lieu of ten years; the second mortgagee to covenant that he would "lift" his second mortgage to enable replacement of then-existing first mortgage by another mortgage for the same amount and for a term of seven years; and the present mortgagor to enter into a personal covenant direct with the mortgagee.

CASE No. 95. Appeal by a Commissioner of Crown Lands against an order of a Commission remitting rent which had been postponed by the Crown, in pursuance of s. 124 of the Land Act, 1924, upon the ground that such postponed rent was not "rent owing to any applicant" within the meaning of s. 44 of the Mortgagors and Lessees Rehabilitation Act, 1936.

Held, dismissing the appeal, That the mere fact that the rent in arrear had been postponed did not cause it to lose its real character of rent in arrear; and s. 124 (2) of the Land Act, 1924, could not be read so as to make such rent not subject to the provisions of the Mortgagors and Lessees Rehabilitation Act, 1936.

CASE No. 96. Motion under s. 82 of the Mortgagors and Lessees Rehabilitation Act, 1936, by an owner of land for leave to sell his interest in such land after the liabilities concerning it had been adjusted.

Held, That such motion could not be made *ex parte*, and all parties who might be interested in such disposal and the receipts therefrom should be served.

* *Continued from p. 309.*

CASE No. 97. Appeal by a second mortgagee against an order of a Commission further reducing to £319 the amount of a second mortgage, which, it had been agreed under a voluntary adjustment, should be reduced to £500. The second mortgagee stated that in consequence of the agreement arrived at, he had not prepared any argument upon the merits of his case nor was he prepared to cross-examine the mortgagor.

Held, allowing the appeal, That the amount of the second mortgage should be restored to the agreed amount of £500. The Court was of opinion that, upon the facts of this case, there should be no interference with the voluntary adjustment arrived at. It did not appear that an annual charge of £9 above what the Commission considered proper would have any prejudicial effect on the rehabilitation of the mortgagor, especially if the term were adequate and the rate of interest were reasonable.

The Court observed that one of the primary duties imposed upon all concerned with the administration of the Act is to endeavour to promote and facilitate voluntary adjustments: s. 79. It was obvious that, from every point of view, that it was better that parties should settle their differences privately than through the intervention of the Commission and Court. It is also clear that almost every voluntary adjustment must, of necessity, be in the nature of a compromise. The mortgagee must be prepared to take somewhat less than he claims, and the mortgagor to give somewhat more than he thinks he is entitled to give. If both parties adopted the attitude of requiring the utmost to which a Commission might think they were respectively entitled, there would be very few voluntary arrangements.

The foregoing remarks do not, however, absolve a Commission from all responsibility. The purpose of the Act is to rehabilitate mortgagors, and, if the terms of a voluntary arrangement clearly precluded the probability of such rehabilitation, the Commission should intervene. The Court in no way considered erroneous the Commission's estimate of £319 as being the amount to which the second mortgage should be reduced, but merely desired to point out that voluntary adjustments should be encouraged, and they should be interfered with only in cases where it is likely that such adjustment would prevent the purposes of the Act being fulfilled, or where the Commission is not satisfied that the parties have been alive to their rights or have been able to obtain competent advice.

CASE No. 98. Appeal by a mortgagee against an order of a Commission, which, in assessing the productive value of a farm, took the price of butter-fat at a net figure of 13d. per lb. (This was one of several appeals upon the same ground.) The Commission reported that it adopted this net price in all cases, as it made no allowance on the expenditure side for cartage of cream to the factory; and it considered that it was impossible for the average farmer in its district to produce superfine cream during the early months of the milking season, owing to feed-flavours. These two factors, it considered, made a difference of ·36d. in the price for butter-fat.

Held, allowing the appeal, That the correct method of computation is to adopt the price of 13·36d., which should be increased if the applicant in fact receives more, or decreased where the average quality of the cream supplied in the district concerned is below the general average. Cartage and other expenses should then be shown as expenditure.

New Zealand Law Society.

Council Meeting.

(*Continued from p. 295.*)

Encumbrances on Leases.—The following report was received from Messrs. Hadfield, Webb, and Weston :—

Mortgages of Renewable Leaseholds.

It would appear as if some of the comments made upon our memorandum of March 18, 1937, were based upon a misapprehension. Our opinion that legislative confirmation of the District Land Registrar's duty to carry forward encumbrances upon new leases should be given was intended to relate only to leases granted in pursuance of a provision to renew contained in the original lease.

Variation of Leases by Memoranda.

As to the suggestion that leases should be varied by memoranda on the lines of the provision for variation of mortgages, we think its feasibility is of universal application. As to its desirability we think it would be convenient in the simple cases involving nothing more than the alteration of the term of a lease and of the rent payable thereunder, but in cases where more extensive variations are required, it would be inconvenient and for that reason undesirable. In this connection we have fully considered and appreciated the criticism by the Taranaki District Law Society.

Dated at Wellington, this 24th day of Setember, 1937.

After some discussion as to whether or not the scale should be submitted to the Registrars of the Supreme Court for approval, it was decided that such approval should not be sought, and it was resolved that the report should be adopted and that the Committee should be thanked for their services.

The following report by the subcommittee appointed by the Canterbury Law Society to consider the proposals of the Otago Society *re* encumbrances on leases, &c., from the Canterbury Society was considered :—

The Otago Society proposes amendments to the Land Transfer Act so as to provide :

(*a*) For the extension and variation of leases in the same manner as now obtains in mortgages.

(*b*) The keeping alive of the encumbrances on a lease so renewed and automatically bringing them down on the new lease or the renewal.

(*c*) For these purposes including agreements to lease.

To this end a set of amending clauses to the Land Transfer Act have been drafted.

On this proposal and on the accompanying draft clauses your sub-committee offers the following observations :—

1. The proposal to extend to leases registered under the Land Transfer Act the facilities for extension of term and variation of covenants such as now exist in the case of mortgages seems desirable and feasible.

2. In the case where this has been done or a new lease is granted and where the extension or new lease is granted pursuant to a right or option contained in the original lease then any encumbrances on the original lease should be preserved and brought down on the renewal or such new lease.

It is not considered desirable that encumbrances should be brought down on renewals or new leases made between the same parties, as suggested by the Otago Law Society, where the renewal or new lease is the outcome of a fresh contract between the parties not in any way dependent on a right or option contained in a previous lease. To do so would give to a mortgagee or other encumbrances something beyond that which his security gives him right to. Where the subsequent lease is the result of the exercise of a right or option in the original lease, then any security over the original lease if properly drawn would normally provide that the mortgagor should upon the exercise of the right or option execute a further security over the new lease or extension. The automatic bringing down on the encumbrance on the new lease in such circumstances is only giving to a mortgagee an additional protection to which he has normally been regarded as entitled.

3. It is not considered that the proposal should apply except where the original lease, the encumbrance and the new lease or Memorandum of Extension are all registered under the provisions of the Land Transfer Act. It is considered that it would be most undesirable that it should apply to agreements to lease.

A motion that the report of the Canterbury Subcommittee be adopted, and that action be taken to bring it into effect, was carried unanimously.

Land Transfer Assurance Fund—Extension to Cover Forgery.—The following report was received :—

After considering the objections raised to the suggestion that documents should be personally certified as correct for the purposes of the Land Transfer Act by the purchaser or mortgagee or other the party taking the interest, we agree that it will be inadvisable to recommend its adoption.

Dated at Wellington this 24th day of September, 1937.

Claude H. Weston
E. F. Hadfield
R. Herbert Webb.

It was decided to adopt the report, and to thank the committee for their services.

Solicitor acting as Money-lender.—Messrs. Gresson and Taylor forwarded the following draft rule for consideration :—

As the result of a complaint by a District Law Society that a solicitor was acting as Secretary of a registered money-lending company the Council reiterated its opinion, previously set out in Ruling No. 29, that it is improper and unprofessional for a solicitor to act or to advertise himself as a registered money-lender. In addition, the Council decided that Ruling No. 29 should be altered as follows :—

1. That the Ruling should cover not only the case of a solicitor in practice carrying on business himself as a money-lender but cases where a solicitor practises in close association (whether as Secretary or otherwise) with the business of a registered money-lending company.

2. That though it may not be unprofessional or improper *per se* for a solicitor in practice to act as secretary of an incorporated body, it is unprofessional and improper for a solicitor (who by virtue of his profession is an officer of the Supreme Court) to act as Secretary of a company which carries on business as a registered money-lender.

Kenneth M. Gresson.
A. S. Taylor.

A Society forwarded the following letter from a practitioner :—

With reference to the draft ruling prepared by Messrs. Gresson and Taylor on this subject, I desire to point out that the ruling may affect a legitimate practice which has been adopted, not only in my own firm, but in some other local firms and possibly elsewhere. The business of lending money on mortgages is a normal part of a solicitor's business as practised in New Zealand, and generally involves the use of client's funds for first mortgages and the use of the solicitor's own funds for second mortgages. For a considerable number of years we have conducted our second mortgage business by means of a company incorporated for the purpose, members of the firm being the sole shareholders and directors. A reference to the *Money Lenders' Act* will show that such a company must necessarily be registered as a money-lender ; and our company was so registered for several years, and would have to be registered again if conditions warranted the use of our funds in the former manner.

I need hardly say that the company did not carry on the business of a money-lender in the popular sense of the term, but its business was rigidly limited to such transactions as could have been properly entered into by us, notwithstanding our status as solicitors.

As far as I am aware the same may be said with regard to similar companies now in existence in association with several other legal firms in Dunedin. No one could reasonably suggest that there is anything unprofessional or improper in such a practice, but it would fall clearly within the words of the suggested ruling.

I would deprecate as strongly as anyone the association of a solicitor with a money-lending company of the ordinary type, and would be equally prepared to admit that improper things might be done in the running of a company like ours, just as may happen in any other branch of legal business; but, with all respect to the New Zealand Law Society, I would submit that this is not a sufficient ground for condemning the practice *in toto*.

I suggest that the situation might be met by adding a proviso to the effect that the ruling does not apply with regard to any company, the business of which is substantially limited to the lending of moneys on real or leasehold security at rates of interest not exceeding 10%, and the business of which is conducted in accordance with the proper and usual professional standards.

With such an amendment as this I would cordially approve the proposed rule. Without it, however, the ruling would apply to perfectly innocent matters as well as to the sort of thing which we all condemn.

Members thought that there was substance in the matters referred to in the foregoing letter, and it was decided to refer the matter back to the Canterbury Sub-committee to enable them to consider the position of second mortgage companies.

Taxation of Costs under Law Practitioners' Act.—Replies were received from nine District Societies favouring the introduction of the suggested amendment. It was accordingly decided to make the necessary representations to have the Law Practitioners' Act amended to give power to a Judge to review the taxation of a Bill of Costs.

Chamber of Commerce Pamphlet.—The following letter to the President was received from the Secretary of the Associated Chambers of Commerce :—

Dear Sir,— Wellington, July 26, 1937.

Solicitors' Fidelity Guarantee Fund.

With reference to our recent conversation in which you stated that you and Mr. G. G. G. Watson had been appointed to approach us on the subject of the wording of that reference in our booklet which deals with the Solicitors' Fidelity Guarantee Fund—to which reference some of the constituent members of the New Zealand Law Society have taken exception—I have now looked into the matter.

The wording of the passage in question is as follows :—

"Secured the promotion and establishment of a Solicitors' Fidelity Guarantee Fund."

This phraseology is the same as is used throughout the booklet in respect of the various items dealt with therein, and in which various matters the Associated Chambers of Commerce has interested itself from time to time. Many of the matters taken up by the Associated Chambers in the way of advocacy of certain conditions, or facilities, etc., were later established by those who had the necessary authority—the Government, local or public bodies, or other organizations.

The reference in our booklet to the Solicitors' Fidelity Fund was one of the matters listed in the above manner. It was never intended for a moment to imply that the Associated Chambers had been directly responsible for promoting and establishing the Solicitors' Fidelity Guarantee Fund. That, as is well known, was instituted by the New Zealand Law Society, and I well remember personally witnessing the passage of the enabling legislation through the Houses of Parliament.

Why the Fidelity Fund was listed in our programme among other matters was because of the following resolution which was carried at the 1926 Annual Conference of the Associated Chambers of Commerce of New Zealand, held in Wellington :—

> "That this Conference brings before the Law Society the necessity of solicitors handling trust moneys, subscribing to an adequate indemnity insurance, or failing that, the Law Society provides a guarantee fund to admitted solicitors, similar to the guarantee funds provided by the banks."

You will note that this resolution was carried years before the fund was established by the New Zealand Law Society. The fund is an excellent thing, and the legal profession has every reason to be gratified with the manner of its establishment and operation by the New Zealand Law Society.

We trust that what we have said explains the position, and we regret that some of your constituents have read into our booklet a meaning which we never remotely intended to convey. We are very concerned that there should have been any misunderstanding on the subject, and we would be glad if you would make as full use of this letter as possible in order to rectify the misunderstanding which seems to have arisen.

It was decided that the letter be received.

Mortgagors and Lessees Rehabilitation Act.—The Canterbury Society forwarded the following letter :—

We shall be glad if you would bring before the Council of the Society a matter arising out of the operation of the above mentioned Act, which appears to us to require consideration with a view to obtaining an amendment of the Act.

Section 82 of the Act places certain restrictions on mortgagors or tenants who have received adjustment of their liabilities, the effect of such restrictions being that in the event of the mortgagor selling or wishing to sell his property at any time prior to the 1st January, 1941, such sale has to be approved by the Court of Review. In particular, subs. (3) gives power to the Court to order the distribution of any surplus over and above the amount of the adjusted liabilities between the creditors who were affected by the original order.

Let us take the case, however, of a mortgagor who has been considered by the Commission just sufficiently efficient to warrant an adjustment which, let us say, reduced the amount of the mortgage on his property from £3,000 to £2,000, the £1,000 adjustable debt having been written off. In twelve months' time, from some cause or other, such mortgagor may be unable to pay his way, and the mortgagee then becomes entitled to and does exercise his power of sale, and has no difficulty in selling the property for £3,000, which was the original amount owing to him. We cannot find any provision in the Act, which would allow such a mortgagee to claim that such excess amount over the £2,000 be paid to him or distributed under the control of the Court.

If it is considered just to prevent the mortgagor who has received an adjustment from selling at a profit without the Court having control over such profit, it seems to us that it would be still more just that a mortgagee, who is forced to exercise his power of sale after the adjustment, should not be deprived of a similar right.

Members pointed out that the idea underlying the Rehabilitation Act was to get finality, and that it was undesirable to do anything to prevent this end being attained. It was decided accordingly that no action should be taken.

The question of approaching the Commissioner of Stamp Duties for a ruling concerning agreements for voluntary settlements, contending that such agreements for adjustment should be free of duty, was considered, and it was arranged that the Wellington members would interview the Commissioner.

Council Meetings.—The President pointed out that the Society's rules provided definitely for four Council meetings each year. He asked for the opinion of members as to whether a meeting should be held in December, if only unimportant matters were in hand for the Order-paper. It was decided to hold such meeting.

From Day to Day.—Mr. Pearson, the author of *Memories of a K.C.'s Clerk*, once lost a book in the late Mr. Justice Joyce's Court. He was making rather a noise looking for it, and the Judge asked what was the matter :—

"He's lost a book, sir," explained the usher.

A twinkle came into Joyce, J.'s eye. A Judge who can joke in a Chancery Court is a first-class humorist, and Joyce, J., lived up to his reputation.

"A book!" he said, in a surprised tone of voice. "Only a book! Why, people lose suits here every day."

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Memorandum of Lease of Part of a Public Domain for Grazing Purposes.

(*Concluded from p. 312.*)

10. Except for burning-off purposes the Lessee will not permit fires to be lighted save and except in a properly appointed fireplace within a building upon the said land and will use his best endeavours to avoid the risk of fire and to prevent grass and other fires upon the said land.

11. The Lessee "will fence" within the meaning ascribed to those words in the Sixth Schedule to the Land Transfer Act 1915 and will repair and maintain all fences on and near the boundaries of the said land throughout the said term and provided that neither the Lessor nor the Board shall be liable nor be called on to erect or repair or contribute towards the cost of erection or maintenance of any fence between the land hereby leased and any land adjoining thereto.

12. The Lessee "will insure" within the meaning ascribed to those words in the said Sixth Schedule to the Land Transfer Act 1915 and all moneys received pursuant to any such insurance shall be expended in or towards repair reinstatement and re-erection of buildings on the said land.

II. Provided always and it is hereby agreed and declared as follows:

13. This lease shall be deemed to constitute a personal contract between the Lessor and the Lessee and the Lessee will not assign transfer sublet or part with the possession of the said land or any part thereof without the consent in writing of the Lessor first had and obtained.

14. In case the rent hereby reserved or any part thereof (whether legally demanded or not) shall be in arrear and unpaid for the space of thirty days after any of the days hereby appointed for payment of the same or in case the Lessee shall at any time fail to perform or observe any of the covenants on the part of the Lessee contained or implied then and in any such case it shall be lawful for the Lessor by notice in writing delivered to the Lessee or posted to the Lessee's address at to determine this lease and thereupon or at any time thereafter to re-enter upon the said demised premises and the Lessee and all other tenants and occupiers thereof therefrom to expel and remove and such notice determination and re-entry shall not release the Lessee from liability in respect of any antecedent breach or non-observance of any covenant or condition herein contained or implied.

15. All powers rights and authorities vested in the Lessor by this lease may be exercised and enforced for and on behalf of the Lessor by the Board. All rents and other moneys payable by the Lessee to the Lessor under this lease shall be paid to the Board or to such person as the Board shall from time to time appoint to receive the same. Any notice demand or consent to be given by the Lessor under this lease may be given for and on behalf of the Lessor by the Board in writing signed by the chairman or secretary of such Board. Any notice required to be given to the Lessee under this Lease may be served on the Lessee by delivering the same to him personally or by posting the same by registered post addressed to the Lessee at aforesaid. Any notice required to be given by the Lessee to the Lessor under this lease may be served by delivering the same to the Chairman or Secretary of the Board addressed to the Board.

16. Neither the Lessor nor the Board warrants that this lease is or will be registrable and if the Lessee shall desire to effect registration under the Land Transfer Act 1915 he shall do so at his own sole cost and expense in all things inclusive of cost of survey if necessary.

17. All costs of and incidental to this lease and the counterpart thereof shall be paid by the Lessee.

18. The Lessor or its agents and the Board also shall be at liberty at all reasonable times during the said term hereby created to enter upon the demised premises or any part thereof to view and inspect the same.

19. Nothing herein contained shall authorize the erection of any building that will interfere with the use and enjoyment of the said land as a recreation ground or any building for use and occupation for any purpose inconsistent with the purposes of the said Domain

The above-named and described Lessee doth hereby accept this lease of the above-described land to be held by him as tenant subject to the conditions restrictions and covenants above set forth.
In witness &c.

[*Certificate in pursuance of Official Appointments and Documents Act*, 1919.]

Signed &c. [*Lessee.*]

[*Consent of Domain Board.*]

[*Consent of Rating authority and acknowledgment that Lessee not liable to be rated.*]

Correct &c.

Correspondence.

The Editor,
N.Z. Law Journal,
Wellington, C.1.

Dear Sir,—

In the case of *Davies v. Thomas*, [1900] 2 Ch. 462, at p. 471, 83 L.T. 11, at p. 14, Rigby, L.J., is reported as having said:—

> "I am satisfied that this Court never intended to lay down an Alsatian rule that if . . . "

I am puzzled to account for the use of the adjective, "Alsatian." It occurs also in the Law Journal report of the case (69 L.J. Ch. 643), so that if the word used by the Lord Justice was "absolute," which at the first glance seems a reasonable explanation, then three reporters each took him down incorrectly. The errata attached to the L.R. volume do not help. Can any of your readers suggest the explanation?

Yours faithfully,
P. B. Broad.

Wellington,
November 12, 1937.

Australian Letter.

By JUSTICIAR.

Bigamy.—A recent decision of the Full Court of Victoria on this question may interest you. In *R. v. Thomas* (1937 V.L.R. 283) the facts were as follows:—The accused had married one Agnes Julia Higgins on October 25, 1929, and she was alive on April 22, 1936, on which date the accused was a party to a form of marriage between himself and one Bessie Deed. It was proved that Agnes had been the respondent to a petition for divorce by one Higgins, that a decree *nisi* was granted on April 27, 1928, and that on July 28, 1928, the Prothonotary of the Supreme Court had entered on the petition a memorandum that he had made the decree absolute in accordance with the provisions of the Marriage Act. Evidence was tendered on behalf of the accused, and admitted, of statements made on a number of occasions by Agnes to him subsequent to his marriage with her, prior to his going through the form of marriage with Bessie, to the effect that the decree *nisi* had not been made absolute on October 25, 1929, and that consequently the marriage between herself and the accused was not a valid one.

The learned Judge directed the jury on the authority of *R. v. Wheat*; *R. v. Stocks*, [1921] 2 K.B. 119, that a *bona fide* belief by the accused in the statements made to him by Agnes based on reasonable ground was not a good defence to the charge of bigamy. The jury returned a verdict of guilty.

The Full Court held that the trial Judge was in error. The authorities discussed were *R. v. Tolson*, (1889) 23 Q.B.D. 168, and the earlier decisions of the Victorian Court: *R. v. McMahon*, (1891) 17 V.L.R. 335, and *R. v. Adams*, (1892) 18 V.L.R. 566. The Court was of opinion that the decision in *Wheat's* case "was based upon a mistake as to what had been the grounds of the opinion of the Court in *Tolson's* case."

Police sued for Trespass and Assault.—Reference has been made in a previous letter to the number of cases in New South Wales of recent times in which the police have been sued. Another has now been been added to the list.

Francis Walter Byrne and Ethel Marion Byrne claimed £5,000 and £1,000 respectively from Detective-sergeant L. A. Dimmock, and Detective-constables J. W. Law and W. S. Tyler. The husband sued for trespass and assault while the wife said that because of the unauthorized acts of the police an unfavourable heart-condition had been aggravated.

Evidence was given in support of the claim that the police officers came to the front door of the Byrne's dwelling at 8.30 p.m. when Mr. and Mrs. Byrne were in bed. Dimmock was alleged to have charged into the house after some conversation, and Byrne was struck a blow on the jaw which caused him to fall.

It was alleged that Dimmock said concerning Byrne: "This man has been obtaining groceries by false pretences at Campsie." Afterwards the police made an unlawful search of the premises. All this was done in front of Mrs. Byrne. The police were without a search-warrant.

Byrne claimed that he did not know that they were police until afterwards when they were all in the street. The police version was that they were looking for a woman supposed to live in the flat; that they were invited in by Mrs. Byrne; that they produced their warrant-cards immediately; and that Dimmock had not pushed his way into the flat nor struck Byrne.

In all, £6,000 was claimed by husband and wife. The actions were consolidated. In the husband's action £250 was awarded against the three police officers for trespass. Under a count for assault there was a verdict against Dimmock only for £500. Under the count for assault there was a verdict for Law and Tyler by direction. There was also a verdict by direction for the three police officers under a conversion count.

In the case of the wife the jury awarded £100 against Dimmock under an unusual count, which set out that in the presence of the wife the husband was assaulted and accused of having obtained goods by false pretences, and the premises were searched, and that because of these things the wife was suffering and would continue to suffer. His Honour directed a verdict for Law and Tyler under this count. Under a second count in the wife's case alleging damage from trespass the jury awarded £50 against the three defendants.

Summary Justice.—Under this heading the writer of the "London Letter" of September 10 asks for a precedent where an unsuccessful prosecutor assaulted in Court a successful defendant. Recently in maintenance proceedings before a Magistrate in Sydney an unsuccessful wife dashed at her husband in the Court and severely slashed his face with a razor. Shortly afterwards a sensation occurred in Quarter Sessions. An accused slashed his left wrist with a safety razor before he could be prevented by Court officials.

He had appealed to Judge Sheridan against his conviction and a sentence of two years' imprisonment imposed upon him at the Central Police Court on charges of false pretences, urging that the sentences were unduly severe. He asked that he should be given a chance, though he recognized that his record did not warrant any leniency being extended. He attributed his lapses to excessive drinking. If he were given a chance, he pleaded, his people were prepared to send him to *New Zealand* (italics mine). He asked to be bound over for five years.

His Honour dismissed the appeal, whereupon accused asked that sentence be reduced by one day so that he might be placed in the less-than-two-years division, which would enable him to obtain certain gaol privileges. His Honour declined to accede to that request. It was then that he took a safety razor from his pocket and slashed his left wrist. His Honour announced that he would reduce the sentence by one day.

Assigned Wages.—Owing to the fact that a large amount of the wages of employees of the Sydney City Council has in the past been paid direct to money lenders who held assignments from the employees, the Council recently obtained a variation of the award covering the employees. The amended award provided: "That the employee's wage shall be paid as it falls due, and no payment in respect thereof shall be made to any person by virtue of any order, document, or instrument whereby the employee may have assigned or attempted to assign his salary or wages." The money-lender then commenced proceedings in the Equity jurisdiction seeking to compel

the Council to continue payments under the assignment. Briefly expressed, the case for him was that the variation of award was not valid, being in respect of something which was not an industrial matter. The Council submitted that it was bound by the variation of award, and that the Court could not be asked to review an award.

Nicholas, J., held that the Industrial Arbitration Act prevented the Court from inquiring whether the industrial tribunal had power to make the award. Except as provided for, no award, order, or proceeding of the Conciliation Commissioner was liable to be challenged, appealed against, quashed, or called in question by any Court on any account whatever. There being no power to inquire into the case, or issue an injunction, it would not be proper to express an opinion on whether the matter on which the Industrial Committee ruled was an industrial matter or not.

It has been stated that this case governs assignments to money-lenders by about 100 employees.

Collusion.—There was an interesting decision on this question in *Amber v. Amber*, [1937] S.A.S.R. 27. Having found desertion for the necessary period, the learned trial Judge also found that an agreement had been made by the parties with respect to the costs of the proceedings. It appeared that the defendant wife came to see the plaintiff husband and asked him if he would divorce her; that he said he would if he had the money, and that he said he would have divorced her years ago if he had had the money; that she then said "Supposing I find the money, will you go on with it?" and that he replied "You find the money and I will go on with it,"; and a sum of money, the amount of which was not disclosed, had been deposited by the defendant with her solicitor to pay the costs of the proceedings. There was no other evidence with respect to the matter.

Read, A.J., referred to a previous decision of the Full Court in *Brine v. Brine*, [1924] S.A.S.R. 433, in which Poole, J., had said that "the collusion, that is the agreement or the conduct from which agreement is inferred, must be such as to hamper the Court in its function as custodian of the public interest in the proceedings," and His Honour held that the facts in this case were not such that he should hold that the agreement amounted to collusion.

A New Zealand Decision questioned.—You may be interested in *Gilbert v. Gilbert*, [1937] S.A.S.R. 79, recently decided by the Full Court of South Australia, which overruled a previous decision of the Chief Justice in *Cook v. Cook*, [1934] S.A.S.R. 298, which had followed *Douglas v. Douglas*, (1903) 23 N.Z.L.R. 584, from your own Supreme Court. In the earlier case it had been said that the effect of Williams, J.'s, judgment was that the adultery of the husband is just cause or excuse for a wife remaining away from him although she was not aware of it until he instituted proceedings against her, and it had been said in that case

> "that the wife did not know of the adultery until the husband admitted it at the hearing, would make no difference for, from the moment he committed adultery, he would have no right to compel his wife to live with him."

After discussing a number of the well-known authorities in England and in the High Court of Australia, Angus Parsons, J., said that in *Douglas v. Douglas* an analogy had been found in the principle that in an action brought by a discharged servant for damages for wrongful dismissal the master could answer on a ground for dismissal though unknown to him at the time he terminated the contract of service. The distinction between that type of case and those under consideration was that the servant had to set up a contract of service and show that he was ready and willing to perform it. Directly it appeared that he had broken his contract, he must fail, whereas the relations which govern the contract of husband and wife are not contractual, they are governed by the status of marriage. Richards and Cleland, JJ., delivered judgments to the same effect.

Lady Houston's Millions.—An initial distribution of £20,500 is expected to be made in the near future among six members of a Queensland family from the estate of their great aunt, Lady Houston, the widow of the millionaire shipowner, the late Sir Robert Paterson Houston. The estate is estimated at £7,000,000 net, and a one-fifth share will be divided among the Australian claimants. It was stated originally that each of the local claimants would receive more than £100,000 but this has not yet been confirmed. The successful Australian claimants are the well-known Queensland Turf Club Trainer, Mr. Spencer Vaughan of Ascot; Mr. Roger Vaughan of West End, Brisbane; Mrs. Eileen Branthwaite and Mrs. Beatrice Dean, both of Albion, Bisbane; Mrs. Madge Dwyer of Melbourne; and Mrs. Olive Pohlmann of Maryborough.

Court of Arbitration.

Designation of Each Court.

By virtue of the Industrial Conciliation and Arbitration Amendment Act (No. 2), 1937, provision was made for the appointment of another Judge and two nominated members to constitute a second Court of Arbitration, and Mr. Justice Hunter was appointed under that Act, as subsequently amended before his appointment, and Messrs. W. E. Anderson and A. W. Croskery were nominated and appointed as the employers' and workers' representative respectively.

In a pronouncement made by the Judges of the Court of Arbitration on November 25, it was stated that it was considered desirable that definite terminology should be adopted with a view to distinguishing the two Courts. It had been decided accordingly that they should be designated respectively as "Court of Arbitration" and "Second Court of Arbitration." Both are of equal jurisdiction, but for the purposes of convenience it was necessary that there should be a recognized designation for each.

The statement went on to refer to the practice that had grown up of designating the Judge as "President of the Court," while the two nominated members were frequently referred to as "assessors." In point of fact, however, this terminology is inaccurate. The tribunal consists of a Judge and two nominated members. The Judge is correctly designated "Judge of the Arbitration Court," but his colleagues are equally members of the Court. They are correctly referred to as "employers' and workers' representatives"; but they are not assessors. The term "assessors" is properly applicable only to members of a tribunal under the chairmanship of a Conciliation Commissioner, appointed to deal with industrial disputes in the first instance.

Retirement and Presentation.

Registrar-General of Land and Assistant Commissioner of Stamp Duties, Wellington.

On the retirement from office of the Registrar-General of Land, Mr. J. J. L. Burke, and of the Assistant Commissioner of Stamp Duties, Mr. W. H. Fletcher, at Wellington, there was a large gathering of members of the profession in Wellington to bid them farewell.

The President of the Wellington District Law Society, Mr. D. R. Richmond, said that both gentlemen are well known to every Wellington practitioner, Mr. Burke as Registrar-General of Land and District Land Registrar, and Mr. Fletcher as Assistant Commissioner of Stamp Duties. Both had been directing Departments with which members of the profession were in almost daily contact, and sometimes in argument. "In regard to those arguments," said the speaker, "if we have had them, they have been carried out in a good friendly spirit and have left no mark on any of the participants therein." Both Mr. Burke and Mr. Fletcher had given long and faithful service to their own Departments, and had dealt fairly and helpfully with practitioners, one of whom, with a difficult matter under the Land Transfer Act had only to approach Mr. Burke to be sure of the very best assistance, and very often of a suggestion which enabled the difficulty to be overcome. "If I may say so without presumption, I feel that Mr. Burke's adminstration of the Land Transfer Act in Wellington has been a model of what the administration of that Act should be," said Mr. Richmond amid applause.

Mr. Fletcher, he continued, also had always been ready and willing to give sympathetic attention and consideration to representations made to him. He had, of course, the difficult job of administering a Revenue Department, but all agreed that he had nicely kept that balance between the, shall we say, insatiable maw of the State, and the profession trying to save their clients from perhaps something in the way of duty.

"We have very pleasant memories of our associations with Mr. Burke and with Mr. Fletcher, and we hope that their memories of their associations with us will be equally pleasant. We wish them long life to enjoy their leisure, and we ask Mr. Burke to accept this oak escritoire, and Mr. Fletcher this silver cigarette-case and cigarette-box as mementos of the very pleasant and always cordial relations that have existed between the profession and them, and also as a mark of the high regard in which they are held by the profession." (Applause).

In his reply, Mr. Burke, after thanking the Wellington practitioners, said that it was a long time since he joined the Government service, some forty-two years previously. "I joined then as a Civil Servant, and I thought it was only my duty to be a Civil Servant when there was any business to be done," he confirmed. "If during the time you gentlemen have been associated with me, I had not had the sympathy and support of the profession, my task would have been much harder. All the years I have been in the Service, I have always found the profession ready and willing to help us in the Civil Service to fall in with, not what they wanted, but what we considered was correct and proper to be done. In all those years, I do not think I have ever had a quarrel with any one of the profession, and, more especially here in Wellington, I have found it very helpful indeed.

"Anything I have done, I have felt I was only doing my duty, and did not expect anything in the way of a present at the time of my retirement. It is something to be proud of, something that I will certainly cherish, and as Mr. Richmond expressed it, I hope that I have many years to be able to use it. I thank you very sincerely for what you have said, and for this handsome present."

In returning thanks, Mr. W. H. Fletcher said that in his forty-two years experience he had always been agreeably surprised at the way the legal profession had met him. They had always come to him if they wanted to know anything, and put their cards on the table. "And when a man does that, and puts his case before you, you can tell at once that he is acting in accordance with the highest traditions of his profession," the speaker added.

Continuing, Mr. Fletcher said that he always appreciated the part that the legal profession has to take. They are the collectors of revenue, and they have the hardest part. They have to get the money out of their clients, and not only the money that the Stamp Department requires, but also their own costs.

"But they have got to get ours first, and there is no doubt about it. I think we have got to recognize that the members of the profession are the collectors of the revenue. We have to take it off them, but, as far as the collection of revenue is concerned, we want no more than what the Act allows us to take, and I think that the majority of practitioners always bears that in mind. We do not try to get the most we can, although, I think, some feel we do. But the profession in Wellington have always been very fair to me; and I have got to thank them a lot for the way they have assisted me in carrying out my duties."

Mr. Fletcher said that it seemed a long time since he started in Wellington, in a little building at the back of the Government Buildings; and he remembers many of those present, who, in those days, were law clerks, and he was very pleased to see how they had progressed. As for Mr. Burke and himself, their time is drawing to a close, but they were not done yet. The Government seemed to think that, after forty years' service, it was time to have a rest and let somebody else step up; and that is what they were doing. He again thanked the Wellington practitioners for their gifts, and their kind remarks.

The late Mr. Justice Avory had his moments of humour. He was once hearing a slander case in which two women were involved:—

Amongst other things each had threatened to pull off the other's street-door knocker. Don't ask me why! One lady (the defendant) had actually said: "I will pull your b——— knocker off."

Here Avory, J., intervened.

"We must differentiate between these knockers," he said gently. "The plaintiff's street-door knocker will be knocker 'A,' since it is obvious that the defendant's must be knocker 'B.'

Practice Precedents.

Probate and Administration: Inventory and Accounts.

Within three months after the grant of probate or letters of administration, or within such further period as the Judge on application may direct, an executor or administrator must file in the Registry in which such probate or letters of administration has been granted, a true and perfect inventory of all the estate, effects and credits of the deceased which shall come into his possession or the possession of any other person by his order or for his use. Every inventory so filed shall be verified by affidavit: Rule 531o of the Code of Civil Procedure. The affidavit is made by the executor or administrator.

Within twelve calendar months after the grant or within such further time as the Judge on application may direct, the executor or administrator must file a full and distinct account in writing of his administration setting forth the dates and particulars of all receipts and disbursements. The account must also be verified by affidavit. If the account be not filed within the period of twelve months, a Judge, on application, may extend the time. If, at the expiration of this extended time, the executor or administrator fails to pass his accounts, he is chargeable with interest out of his own funds at the rate of ten pounds per centum per annum for the balance (if any) remaining in his hands, unless he can show good and sufficient cause to the contrary.

The question as to what form of procedure should be adopted arises, and it should be pointed out that the application to extend time is usually made by *ex parte* motion. The executor or administrator applies; but where, for instance, the inventory and accounts have *not* been filed and no application to the Judge has been made to extend the time, the *beneficiaries* may apply to the Judge by summons directed to the executor or administrator to show cause why he should not file same. In the first application *notice* is not required; but in the second (by summons) it is. This would not of course preclude the Judge when dealing with the *ex parte* motion from ordering any person to be served: see RR. 413D, 413E, and 413F. The English procedure appears to be somewhat different from the New Zealand procedure: see *Mortimer on Probate Law and Practice*, 2nd Ed. 501.

Under RR. 537 and 538 of the Code of Civil Procedure, an order for accounts has been made on an order arising on originating summons: *Murray v. Carter*, (1912) 31 N.Z.L.R. 497. Procedure by way of originating summons, however, must not relate to contentious matters: *In re Powers, Lindsell v. Phillips*, (1885) 30 Ch.D. 291; and R. 546 provides that, when any question of fact arises, the Court or a Judge shall direct how the same shall be determined, and may order the same to be placed in the list of actions to be tried in such manner as the Court or Judge thinks fit: see hereon, *In re Davies, Davies v. Davies* (1880) 38 Ch.D. 210.

In *Tiffin v. Tiffin*, [1916] N.Z.L.R. 656, it was held proceedings should have been by motion or summons and not by action, and *Balderston v. Campbell*, (1891) 10 N.Z.L.R. 64, where proceedings were allowed by action, was commented upon. In *Tiffin's* case an order as to costs was refused, as, in the opinion of Stout, C.J., the proceedings had been improperly brought, and the executors should have filed an inventory, and, as the administration was not completed, they should have applied for extension of time to file an account under the rule.

Frequently, the inventory and accounts are not filed in the Registry. The Judge is only concerned when an application is made to him, and no *direct* action is taken unless an application is made by the executor or administrators or some interested person entitled to move.

This precedent provides a motion for extention of time. It will be followed later by a Summons to Executors to show cause why they should not exhibit an inventory and file accounts.

MOTION TO EXTEND TIME WITHIN WHICH TO FILE ACCOUNT IN WRITING.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE ESTATE of A. B. &c. deceased.

Mr. of Counsel for C. D. &c. the executor of the will of the said A. B. deceased to move in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court-house at on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER that the said C. D. do have such further time as may be directed within which to file in the Registry of this Honourable Court at a full and distinct account in writing of his administration of the estate of the above-named A. B. deceased UPON THE GROUNDS that administration of the estate has not been completed within the prescribed period AND UPON THE FURTHER GROUNDS appearing in the affidavit of C. D. filed herein.

Dated at this day of 19 .

Solicitor for applicant.

Certified pursuant to the Rules of Court to be correct.

Counsel for applicant.

REFERENCE.—His Honour is respectfully referred to R. 531P of the Code of Civil Procedure.

Counsel for applicant.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I C. D. of the City of Clerk make oath and say as follows:—

1. That by an order of this Honourable Court made at the City of on the day of 19 probate of the last will of the said A. B. was granted to me this deponent the executor in the said will named.

2. That on the day of 19 an inventory of the assets in the estate of the said A. B. deceased was duly filed in the Registry of this Court at .

3. That a large part of the said estate consists of hotels both public and private in which leases and mortgages are involved.

4. That owing to the complicated state of the accounts and to the meagre nature of the information available in regard to the property it has been impossible to finalize accounts and prepare the property for sale at prices which would be advantageous in the present state of the property market.

5. That for some months prior to his death the said A. B. was indisposed and early in his illness dismissed his accountant who had attended to his financial affairs for years.

6. That no assets other than personalty have been realized which realization has netted the sum of £ .

7. That on the said account one E. F. of the City of has now been engaged to carry on the business and assist generally in winding-up the estate.

8. That in view of the circumstances and special nature of the undertakings it is estimated that another twelve months will be required to complete the administration of the estate.

9. That the last day for filing the account in writing expired on the day of 19 .

Sworn &c.

ORDER EXTENDING TIME FOR FILING ACCOUNT.

(Same heading.)

day the day of 19 .

UPON READING THE MOTION filed herein for an order to extend the time for filing an account in writing of administration and the affidavit filed in support thereof AND UPON THE APPLICATION of Mr. of Counsel for the said C. D. it is ordered by the Honourable Mr. Justice that the time within which the said C. D. do file his account in writing of the administration of the estate of the said A. B. deceased be and the same is hereby extended for the period of twelve calendar months from the day of 19 .

Registrar.

Obituary.

Mr. J. F. Lillicrap, Invercargill.

Mr. John Frederick Lillicrap, of Invercargill, who died on November 16, at the age of seventy-one, after a long period of ill-health, was born in Kaiwarra, Wellington, and went as a child to Invercargill. He was educated at the Grammar School, and from there entered the Lands Registry Office at Invercargill. He studied law and was transferred to Dunedin, where he completed his studies, and, on admission, he returned to Invercargill, where he began to practise on his own account in 1895. In January, 1899, he went into partnership with Mr. W. A. Stout and later Mr. W. Y. H. Hall, who has since died. In 1929 Mr. Lillicrap retired from the firm and began a practice in Palmerston North, returning to Invercargill early last year.

Mr. Lillicrap was a member of the Invercargill City Council from 1901 to 1906 and from 1909 to 1921; and from 1921 to 1923 he was Mayor of Invercargill, holding that office during the jubilee year of the borough. He took a keen interest in all branches of civic life and was one of those instrumental in securing the erection of the Town Hall and Theatre, and in bringing about amalgamation in the interests of the Greater Invercargill movement. When the amalgamation was effected, he was a member of the first elected council.

He was at one time president of the Invercargill Law Society and for seven years its secretary. He was also a member for many years of the Invercargill Golf Club, and was chairman of the first meeting of motorists to form the Automobile Association (Southland) of which he remained a member for a long period. He also held office as president of the association from 1922 to 1924. The Invercargill Literary and Debating Society was another of his interests during the earlier years of his life in the city.

Mr. Lillicrap is survived by his wife, one son, Mr. John Lillicrap, of Invercargill, and one daughter, Mrs. Eric Drew, of Palmerston North. He has also three brothers and one sister living—Messrs. H. and, W. Lillicrap, of Invercargill, and Mr. D. V. Lillicrap, of Auckland, and Mrs. W. H. Nicholson, of Invercargill.

At a gathering of members of the profession on November 18, at the Magistrate's Court, the president of the Southland Law Society (Mr. E. H. J. Preston) said that they had assembled to pay a last tribute to the memory of Mr. Lillicrap, who would be remembered by all those with whom he came in contact as a very courteous, unassuming gentleman whose word was his bond and who was faithful in the discharge of his duty to his clients. His fellow-practitioners would remember him as one well grounded in the law, as an able conveyancer, and as a solicitor with whom it was a pleasure to have business relations. "He will be remembered as a man of a retiring, yet kindly, nature who inspired respect, loyalty, and affection," concluded Mr. Preston. "It is my sad duty on behalf of the members of our society to extend to his widow, his son, and his daughter our very sincere sympathy."

Mr. C. S. Longuet said that members of the profession felt Mr. Lillicrap's death greatly. Mr. Lillicrap had always been held in the highest esteem, and had been well known for his participation in municipal affairs, in which he played an important part as councillor and Mayor.

"Mr. Lillicrap maintained the very highest traditions of the Bar, and the keynote of his success with his clients can be embodied in the one word 'thoroughness,'" said Mr. Eustace Russell. "Mr. Lillicrap went north for a period, but he showed himself a true Southlander; the call was too great, and back he came to Invercargill."

Mr. W. A. Stout said he and Mr. Lillicrap had been partners for over thirty years and a more faithful and loyal partner no man could have had. He was thorough in all his undertakings and confined his activities mainly to office work. "Mr. Lillicrap was a student all his life," he said, "and eventually became a very thorough lawyer."

"I did not, unfortunately, have the privilege of knowing Mr. Lillicrap, but I am aware that he was held in the highest esteem by his fellow-practitioners," said Mr. W. H. Freeman, S.M. "To his friends and relations I extend my very sincere sympathy."

Recent English Cases.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

APPORTIONMENT.

Tenant for Life and Remaindermen—Apportionment—Payment of Apportioned Part Out of Purchase Money to the Estate of Tenant for Life.

If a testator settles his residuary estate upon trust for two tenants for life, and one of them dies, the trustees selling some of the securities to meet the death duties, the dividends ought to be apportioned and the personal representatives are entitled to receive the sum representing the proportion of the dividends which have accrued up to the date of death of the tenant for life.

Re WINTERSTOKE'S WILL TRUSTS, GUNN *v.* RICHARDSON, **[1937] 4 All E.R. 63, Ch.D.**

As to apportionment as between tenant for life and remainderman: see HALSBURY, vol. 25, Settlements, pp. 612-614, pars. 1079-1083; DIGEST, vol. 40, pp. 677-680.

ARBITRATION.

Appointment of Arbitrator—Notice to Parties—Appointment of Third Arbitrator—Umpire.

Where a third arbitrator is appointed the parties must be given notice of his appointment and of his intention to act

in the arbitration where the contract, or rules in accordance with which the contract is made, provide for such notice.

Re AN ARBITRATION BETWEEN BRITISH METAL CORPORATION, LTD., AND LUDLOW BROS. (1913), LTD., **[1937] 4 All E.R. 154. Ch.D.**

See HALSBURY, Hailsham edn., vol. 1, pp. 644, 649, pars. 1093-1099; DIGEST, vol. 3, pp. 401-406.

BANKERS.

Crossed Cheques—Third-party Cheque Indorsed by Customer to Himself—Forged Indorsement—Extent of Bank's Inquiry.

A breach of the bank's own regulations is not conclusive proof that the cashier made insufficient inquiry, nor can a customer demand literal performance of such regulations.

MOTOR TRADERS GUARANTEE CORPORATION, LTD. *v.* MIDLAND BANK, LTD., **[1937] 4 All E.R. 90. K.B.D.**

As to conditions of banker's protection: see HALSBURY, Hailsham edn., vol. 1, pp. 809-812, par. 1330; DIGEST, vol. 3, pp. 240-242.

BANKRUPTCY.

Undischarged Bankrupt—Obtaining Credit to the Extent of £10 or Upwards Without Disclosure—Bankruptcy Act, 1914 (c. 59), s. 155.

When an undischarged bankrupt enters into a contract for the sale to him of share capital and freehold premises on the terms that the purchase price should be payable in weekly instalments of principal and interest, the contract is unenforceable for non-disclosure.

DE CHOISY *v.* HYNES, **[1937] 4 All E.R. 54. Ch.D.**

As to obtaining credit by an undischarged bankrupt: see HALSBURY, Hailsham edn., vol. 2, pp. 463, 464, par. 634; DIGEST, vol. 5, pp. 1052, 1053.

HUSBAND AND WIFE.

Contract—Illegal Contract—Future Separation of Husband and Wife—Public Policy.

If an agreement between husband and wife contains nothing immoral, it is not against public policy, even though it limits the consortium.

DAVIES *v.* ELMSLIE, **[1937] 4 All E.R. 68. K.B.D.**

As to contracts providing for future separation of spouses: see HALSBURY, Hailsham edn., vol. 7, pp. 157, 158, par. 222; DIGEST, vol. 12, pp. 264, 265.

REVENUE.

Stamp Duty—Policy Securing Half-yearly Payments for eleven years upon Payment of a Lump Sum—Sale of Annuity or Security for an Annuity.

A policy issued on payment of a lump sum securing a number of payments over a fixed period of years is not a sale and purchase of an annuity, but security for the payment of an annuity, and subject to duty accordingly.

COMMERCIAL UNION ASSURANCE CO., LTD. *v.* INLAND REVENUE COMMISSIONERS, **[1937] 4 All E.R. 159. K.B.D.**

As to stamp duty on annuities: see HALSBURY, 1st edn., vol. 24, Revenue, p. 724, par. 1559; DIGEST, vol. 39, pp. 275-277.

ROAD TRAFFIC.

Goods Vehicles—Utility Car—Road Traffic Act, 1934 (c. 50), s. 2, Schedule I.

Although a vehicle may primarily be constructed to carry passengers, it will, if the carriage of goods other than passengers' effects was contemplated in its construction, be a goods vehicle within the meaning of the Road Traffic Act, 1934 (c. 50), s. 2, Schedule I.

HUBBARD *v.* MESSENGER, **[1937] 4 All E.R. 48. K.B.D.**

See HALSBURY, Supp. to vol. 27, par. 682; DIGEST, Supp. to vol. 27, No. 232*n*.

WILLS.

Will—No Appointment of Executors—Life Interest with Full Power to Deal with Capital as if Donee's Own.

A testator who gives his residuary estate "with full power to deal therewith as if it were the donee's own," gives a life interest together with a power of appointment exercisable either inter vivos *or by will over the moiety given by the will, where there is no question of a gift over of "anything remaining."*

Re LAWRY'S ESTATE, ANDREW *v.* COAD, **[1937] 4 All E.R. 1. Ch.D.**

As to life interest with superadded power of disposition: see HALSBURY, Hailsham edn., vol. 25, pp. 515-519, pars. 934-942; DIGEST, vol. 37, pp. 389-396.

Bills Before Parliament

Mortgagors and Lessees Rehabilitation Amendment.—Clause 2: Application of principal Act to subsequent mortgage when power of sale exercised under prior mortgage. Cl. 2A.: Defining "date of adjustment" in relation to adjustable debts. Cl. 2B: Specified adjustable debts only deemed to be discharged. Cl. 2C: Power to vary certain orders under which rates are payable, or are secured on any property. Cl. 3: Vesting-orders may be made by Ajustment Commissions. Cl. 4: Restricting exercise of powers under adjusted mortgages. Cl. 5: As to liability of applicant to guarantor in respect of payments made under guarantee. Cl. 5A: Review of the liability of a guarantor who loses his rights against the applicant. Cl. 6: Extending time for recovery of rates where commencement of proceedings prohibited.

Petroleum.—A Bill of forty-seven clauses declaring as the property of the Crown all petroleum (which expression includes any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal, helium, or bituminous shales, or other stratified deposits from which oil can be extracted by destructive distillation) existing in its natural state on or below the surface of any land within the territorial limits of New Zealand, notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease or other instrument of title, whether the land has been alienated from the Crown or not; and prohibiting prospecting or mining for petroleum save pursuant to the Bill.

Mining Amendment.—A Bill of forty-two clauses containing a large number of textual amendments to the Mining Act, 1926.

Local Legislation.—A Bill of fifty-one validating and authorizing clauses affecting various local authorities.

PUBLIC ACTS PASSED.

No. 11. Broadcasting Amendment Act, 1937. Nov. 19.
No. 12. Industrial Conciliation and Arbitration Amendment Act (No. 3), 1937. Nov. 19.
No. 13. Companies (Special Liquidations) Extension Act, 1937. Nov. 19.
No. 14. Physical Welfare and Recreation Act, 1937. Nov. 30.
No. 15. Sale of Wool Act, 1937. No. 30.
No. 16. Coal-mines Amendment Act, 1937. Nov. 30.
No. 17. Finance Act, 1937. Dec. 1.

LOCAL ACTS PASSED.

No. 5. Wanganui Harbour District and Empowering Amendment Act, 1937. Nov. 19.
No. 6. New Plymouth Airport Act, 1937. Nov. 19.
No. 7. Christchurch Tramway Board Empowering Act, 1937. Nov. 30.
No. 8. Dunedin District Drainage and Sewerage Amendment Act, 1937. Nov. 30.
No. 9. Timaru Harbour Board Loan Amendment Act, 1937. Nov. 30.
No. 10. Whangarei Airport Act, 1937. Dec. 1.

Rules and Regulations.

Public Service Act, 1912, and Finance Act, 1936. Public Service (Efficiency Tests) Regulations, 1937. November 5, 1937. No. 275/1937.

Education Act, 1914. Agricultural Bursary Regulations, 1924, Amendment No. 4. November 17, 1937. No. 276/1937.

War Legislation Act, 1917. War Bursary Regulations, 1917, Amendment No. 1. November 17, 1937. No. 277/1937.

Education Act, 1914. Free Place Regulations, 1937. November 24, 1937. No. 278/1937.

Health Act, 1920. Infectious and Notifiable Diseases Regulations, 1921, Amendment No. 3. November 24, 1937. No. 279/1937.