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"Glory, though an enviable thing, is not likely to be won at the Bar; indeed, most distinguished lawyers have begun their acquaintance with the law with not a little aversion, although in the case of some it eventually secured them a reasonable amount of fame."

—The late AUGUSTINE BIRRELL, K.C., in an essay on *Barristers*.

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Intestacy and the Family Protection Act.

IN an article on another page, Mr. A. C. Stephens, author of the text-book on the Family Protection Act, 1908, *The Law relating to Testator's Family Maintenance in New Zealand*, discusses the hesitant and, to the minds of New Zealand practitioners, the unsatisfactory nature of the English statute, the Inheritance (Family Provisions) Act, 1938, relating to the variation of wills. The Court's jurisdiction is limited by this statute to provision out of the testator's estate in the interests of a limited class, the widow or widower of the testator, an unmarried daughter or one incapable of maintaining herself, and an infant son or one incapable of maintaining himself.

It is interesting, therefore, to now learn that the Law Revision Committee, at its last meeting, recommended the extension of the provisions of the Family Protection Act, 1908, to provide the application of Part II to the estate of every person who dies after the passing of the proposed amending legislation, without leaving a will, in the same manner as if he had died leaving a will providing for his estate to be distributed as on an intestacy, and to provide accordingly by that the grant of administration of his estate, for the purposes of the statute, will be tantamount to a grant of probate of his will.

This extension to intestate estates of the provisions of the Family Protection Act is the greatest advance made since testator's family maintenance legislation was introduced in New Zealand over forty years ago. But it is a necessary extension, and a very desirable one.

Up to the present, the statute had no application if the deceased left no will: s. 33 (1). And it has been held that, notwithstanding the deceased's leaving a will, if he had not thereby disposed of his whole estate, the statute does not apply to the portion of his estate in respect of which he died intestate.

Objection was taken nearly forty years ago to the anomaly arising out of the fact that hardship may arise under an intestacy, and that a rigid system of distribution may operate with greater unfairness than a distribution by will. Three years after the passing of the Testator's Family Maintenance Act, 1900, in *Laird v. Laird*, (1903) 5 G.L.R. 466, 467, Edwards, J., said that the powers conferred upon the Court might in a proper case be rightly exercised by giving to a person coming within the benefit of the statute far more than that person would have taken if the testator had died intestate, possibly even to the extent of the whole estate.

His Honour continued:

> "Although it may be an anomaly that a person coming within the benefit of the statute may be far better off if the testator has made an unjust will which makes no provision whatever for his or her maintenance and support than under an intestacy, under which he or she would have taken a considerable portion of the testator's estate, I think that that anomaly is due not to any intention on the part of the Legislature to limit the powers given by the statute, but to an omission on the part of the framers of the statute to notice the fact that in some cases as grave an injustice may be done by not making a will as by making an unjust will. But quite recently a case came under my notice in which an Italian, who had married an English woman, with whose assistance he had accumulated a few hundred pounds, died intestate, with the result that a considerable portion of his estate devolved upon relations in Italy, with whom he had not maintained any correspondence, and whose addresses were actually unknown. There can be no doubt that in this case the widow, who had contributed largely to the amassing of the small property which the intestate possessed, who had given to him the best years of her life, and who was left very imperfectly provided for, had morally the strongest possible claim to the whole of her late husband's small estate."

In *Public Trustee v. Willis*, [1924] G.L.R. 238, Salmond, J., at p. 239, held that it was clear that there was no jurisdiction under s. 33 of the Family Protection Act, 1908, in the case of a total intestacy. He held further,

> "In such a case the Court has no discretionary authority to alter in any respect the statutory distribution of the estate among the family of the intestate, even though that distribution may be unjust in the particular instance. Where, however, the deceased has left a valid will, even though it is not operative as to the beneficial interest in the entire estate, the case falls within the words of the Act, and I see no reason why an order made under the Act should, in such a case, be confined in its operation to that part of the estate which has been effectually disposed of by the will. The provision which the Act authorizes the Court to make is a provision 'out of the estate of the testator.' This, I think, means the entire estate and not merely that part of it in respect of which the will is operative.' . . . I consider, therefore, that an order affects the entire New Zealand estate of the testator except so far as any part of that estate is expressly exempted by the terms of the order itself, and that a partial intestacy has not the effect of automatically exempting from the incidence of the order the property undisposed of by the will."

This judgment was expressly overruled by the Court of Appeal in *In re Yuill, Yuill v. Tripe*, [1925] N.Z.L.R. 196, where the testator died leaving a will in which he bequeathed all his "personal effects and money" to his wife, whom he appointed his executrix, and, in the event of her death, "all to be equally divided" between two of his sons. When he made his will, his estate consisted of money and personal property, and no more; but, before his death, he had become possessed of a house and land, as to which he died intestate. The Court was asked whether there was power to make an order under s. 33 of the Family Protection Act, 1908, affecting such realty. The originating summons was removed into the Court of Appeal for hearing and determination.

Section 33 (1) of the statute is as follows:—

> "(1) If any person (hereinafter called 'the testator') dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children."

In the course of his judgment, Sir Robert Stout, C.J., at p. 203, said :

" The words relied on in the judgment [in *Public Trustee v. Willis* (*supra*)] are ' estate of the testator.' But if read as meaning the estate not gifted by will, why are the words ' of the testator ' used ? Further, so reading the section means overriding the Statute of Distributions of intestate estates. There is no express statement in the Family Protection Act that property not dealt with by will is to be affected. No maxim is more common than that implied repeals are not to be favoured ; but if the Court, under the Family Protection Act, which hitherto dealt only with property left by will, is allowed to deal with property undevised, then the Statute of Distributions is again evaded, and in my opinion such an evasion is not allowable. Before the Act can apply a ' will ' must be left ; and surely it was because the operation of a will disposing of property might be unfair to wife or children, or to both, that the law was passed. Suppose a will did not devise or bequeath any property, but simply named an executor, could the Court, under the Family Protection Act, proceed to distribute it without regard to the rights of the next-of-kin to whom the property by our Statute of Distributions belonged ? I do not think so.

" Again, what is to become of the provisions in the Statute of Distributions for the payment of £500 to the widow ? That is given to her by our Statute of Distributions. Could that be taken from her under the Family Protection Act ? If a right accrues, not under a will, and if the rights of the next-of-kin can be destroyed, will not the Court have a right to deprive a widow of her rights under s. 49 of the Administration Act, 1908 ?

" In my opinion, in this case the law is that the land will go to the persons entitled under the Statute of Distributions."

Sim J., at p. 205, said :

" I agree that the power given by s. 33 of the Family Protection Act, 1908, applies only to the part of the estate which the testator has disposed of by his will, and that the decision to the contrary in *Public Trustee v. Willis* (*supra*) ought to be overruled. The object of the Act is to enable the Court to modify the provisions of an unjust will, and not to authorize it to alter rights in connection with property the destination of which has been fixed by statute."

Adams, J., concurred in the judgment of Sim, J., that the jurisdiction of the Court under s. 33 of the Family Protection Act, 1908, is limited to that part of a testator's estate which he has disposed of by his will, and that the decision in *Public Trustee v. Willis* (*supra*), that the jurisdiction extends to any part of the testator s estate not so disposed of, is wrong.

The amendment of the Family Protection Act on the lines proposed by the Law Revision Committee will, we think, give general satisfaction to all practitioners, many of whom have practical knowledge of cases of hardship arising out of what Mr. Justice Edwards in *Laird v. Laird* (*supra*) indicated to be a *casus omissus* on the part of the Legislature when the first statute dealing with the subject was enacted.

To those not conversant with the difficulties raised by the Court's lack of jurisdiction to deal with intestate and partially intestate estates, a little consideration will show that the extension of the statute to cover those estates is very desirable. The need for making some special provision for the maintenance of a widow, widower, or child is just as great and just as important in the case of an intestacy as it is in the case of a will left by a deceased person, in regard to which, in proper circumstances, the Court will exercise its discretion to grant relief. Frequently, where there is an intestacy, the estate is a small one, and a great injustice may be done to a widow through her being limited, as generally speaking she is, to one-third of the estate by the operation of the Statute of Distributions.

Again, in the case of a testate estate, the Court has the will before it ; in the case of an intestacy it cannot, as the Family Protection Act is now framed, look at what is tantamount to a will created by statute. Just as much potential injustice may be contained in what is, in substance, a will imposed by the cold hand of the Statute of Distributions, as there may be in any ordinary will made by a husband or father in respect to the proper maintenance of a widow or dependent child.

The objections to the alteration by the Court of a testator's intentions, made by the conservative element in the solicitors' profession in England, and indicated by Mr. A. C. Stephens in his article on the new English statute in this issue, apply equally to the alteration of the dispositions made arbitrarily by the statute which substitutes for the testator. In New Zealand, we think little of these objections in the case of testate estates, where the Court may interfere with the dispositions of the testator who has made his will in the light of the circumstances of his own particular family, and with knowledge of the extent of his own possessions, which circumstances and knowledge were presumably considered by him when making his will.

Admitting, as we do, the principle enacted in s. 33 of the Family Protection Act, 1908, which has been reproduced in all the States of Australia, it is a logical step to extend, by express enactment, the Court's jurisdiction to interfere with the disposition of an estate according to an arbitrary rule, which is applicable to a similar extent in all cases, and of which the deceased presumably had little knowledge. The effect of the proposed amendment is to enlarge the Court's power to apply the present provisions of the statute from a distribution by will to a distribution by the automatic incidence of intestacy.

The Law Revision Committee is to be commended for the proposed extension of the provisions of s. 33 of the statute to adjust the distribution of an estate upon an intestacy to the needs of the widow, widower, or children. It is an amendment the profession has desired for many years.

Summary of Recent Judgments.

SUPREME COURT.
Wellington.
1939.
May 15 ;
June 2.
Myers, C.J.

CHARD v. CHARD.

Divorce and Matrimonial Causes—Restitution of Conjugal Rights—Wife's Petition—Parties separated for Indefinite Period by Deed of Separation—Suit undefended—Deed of Separation regarded by Parties as being at an End—Whether Deed should be disregarded—Exercise of Court's Discretion—Divorce and Matrimonial Causes Act, 1928, ss. 10 (1), 18.

In a wife's petition in an undefended suit for restitution of conjugal rights, a decree was granted notwithstanding the existence of an agreement for separation, which was obtained from her by the respondent three days after she had attained the age of twenty-one years, when she was in a condition of great stress and had no independent advice and which the parties had regarded as at an end.

Rose v. Rose, [1932] N.Z.L.R. 561, G.L.R. 237, applied.
Smith v. Smith, [1915] P. 288, referred to.

Counsel : Joseph, for the petitioner.

Solicitors : George Joseph and Olphert, Wellington, for the petitioner.

Case Annotation : *Smith v. Smith,* E. and E. Digest, Vol. 27, p. 317, para. 2949.

SUPREME COURT. Auckland. 1939. April 21; June 13. *Blair, J.*

SUMPTER v. STEVENSON.

Criminal Law—Indecent Publications—Delivery by way of Hire—Lending Library—Whether Hire of the *Decameron* an Offence—Nature and Circumstances of Hiring or Selling—" Purpose with which the act was done "—Onus of Proof—Indecent Publications Act, 1910, ss. 3, 5, 8.

Proof that there are certain portions of a classical work which offend against modern ideas of decency is not enough to support a conviction under s. 3 of the Indecent Publications Act, 1910—*viz.*, of selling or delivering by way of hire an indecent document—as the nature and circumstances of the selling or hiring of such a work, and its literary value, and the purpose for which the Act was done must also be considered.

Reg. v. Hicklin, (1868) L.R. 3 Q.B. 360, and **Clarkson v. McCarthy,** [1917] N.Z.L.R. 624, G.L.R. 401, distinguished.

Reg. v. Thomson, (1900) 64 J.P. 456, mentioned.

Before a person can be convicted of an offence under the statute in respect of such a work, not only must the matter be indecent, but the circumstances of its publication must be such as to bring the indecent element somewhat into the forefront; or, to put it in another way, no offence is committed unless the purpose behind the publication is shown to be such as to give *prominence to the indecent portions of the work.*

Although s. 8 of the statute makes want of knowledge of the indecency of the publication no defence, it does not cast upon the defendant the onus of negativing the elements required by s. 5.

Semble, If the proprietor of a lending library himself advertises a classical work in such a way as to indicate that it is indecent, that is a material factor in deciding whether or not the presence of the book in his library is in the circumstances indecent.

Consequently, the proprietor of a lending library who was charged under s. 3 (*a*) of the Indecent Publications Act, 1910, with delivering by way of hire, or of having in his possession for hire, a translation of Boccaccio's *Decameron*, in the circumstances detailed in the judgment, was, on appeal from a conviction under that section, held to have committed no offence.

Semble, There may be circumstances when the sale or hire of the *Decameron* might be held to be within the mischief aimed at by the statute.

Counsel: Munro, for the appellant; **V. R. S. Meredith** and **N. I. Smith,** for the respondent.

Solicitors: Oliphant and Munro, Auckland, for the appellant; **Crown Solicitor,** Auckland, for the respondent.

COURT OF ARBITRATION. Napier. 1938. December 15. 1939. May 31. *O'Regan, J.*

HAWKE'S BAY BUILDERS' AND GENERAL LABOURERS' INDUSTRIAL UNION OF WORKERS v. HAWKE'S BAY RIVERS BOARD: HAWKE'S BAY DRIVERS' AND RELATED TRADES INDUSTRIAL UNION OF WORKERS v. SAME.

Contract—Co-operative Contract between a Single Contractor and River Board—Contract, complete and clear on Face, providing that no Contractual Relationship existed between Workmen and Board—Construction—Relationship of Independent Contractor.

Where a co-operative contract for work made between a Board and L. signing as " contractor " was complete and clear on its face and contained, *inter alia*, provisions to the effect that the work should be deemed to be carried out on a contract between the contractor and the Board only, and that none of the workmen should be deemed to have any contractual relationship with the Board, L. was held to be an independent contractor.

An agreement, signed by all the men employed by L., by which they agreed to associate themselves with him on the works on the terms set out in the contract between L. and the Board, and containing the following:

" This agreement is made between us and you and each of us and is not the concern of nor to bind the Hawke's Bay Rivers Board,"

was held to show that in the contemplation of the men themselves, L. was an independent contractor, and that the relationship of the Board and the gang of men was not that of master and servant.

In re the Manawatu Flaxmillers' Award, (1909) 12 G.L.R. 102; **Lawless v. The King,** (1909) 12 G.L.R. 327; and **Birss v. The King,** [1923] N.Z.L.R. 1058, [1924] G.L.R. 179, *applied.*

Solomon v. The King, [1934] N.Z.L.R. 1, G.L.R. 23, distinguished.

Counsel: L. W. Willis, for the respondent.

Solicitors: Kennedy, Lusk, Morling, and Willis, Napier, for the respondent.

SUPREME COURT. Wellington. 1939. March 1, 2, 3; June 8. *Blair, J.*

CERVO AND ANOTHER v. SWINBURN (FERRETTI, Third Party).

Damages—Running-down Action—Plaintiff a Market-gardener—Temporarily incapacitated from following Occupation—General Damages claimed for Personal Injury and Loss of Crops and Early Market—Whether such Losses too remote.

If damage follows from an actionable wrong on the defendant's part, the fact that such damage is unusual and not normally to be expected does not disentitle the plaintiff to recover. The test is whether the damage can be directly traced to the tort committed by the defendant. But, if an independent cause is present as an operating factor in the creation of the damage complained of, then the effect of such independent factor lets in the doctrine of remoteness and may disentitle the plaintiff to succeed. But such an intervening cause in order to let in such doctrine must be of such operative effect as, from a practical point of view, to become, in effect, a dominant cause.

Where the plaintiff, a market-gardener, who worked his garden without assistance except on rare occasions, was totally incapacitated from such work for nearly three months owing to injury sustained in a motor collision and was awarded by the jury £150 damages for loss of crops or loss of an early market, after presumably making due allowance for what might have been salved by reasonable efforts or expenditure,

C. A. L. Treadwell and **Mitchell,** for the plaintiffs; **O'Leary,** K.C., and **Rollings,** for the defendant; **Leicester** and **McCarthy,** for the third party.

Held, That the damages so awarded were not too remote.

Duffy v. The King, [1935] N.Z.L.R. 745, G.L.R. 602, distinguished.

The Mediana, [1900] A.C. 113; **Owners of Dredger " Liesbosch " v. Owners of S.S. " Edison,"** [1933] A.C. 449; and **In re Polemis and Furness, Withy, and Co., Ltd.,** [1921] 3 K.B. 560, considered.

Scott v. Shepherd, (1773) 2 Wm. Bl. 892, 90 E.R. 525, referred to.

Quaere, Whether the said damages should not have been claimed as special damages.

Solicitors: Treadwells, Wellington, for the plaintiffs; **W. P. Rollings,** Wellington, for the defendant; **Leicester, Jowett, and Rainey,** Wellington, for the third party.

Case Annotation: *The Mediana*, E. and E. Digest, Vol. 17, p. 79, para. 9; *Owners of Dredger " Liesbosch " v. Owners of S.S. " Edison," ibid.*, Supp. Vol. 41, para. 6694a; *In re Polemis and Furness, Withy, and Co., Ltd., ibid.*, Vol. 36, p. 29, para. 151.

Mortgagors' Relief Legislation.

A Consideration of Section 82.

By C. N. Armstrong, LL.B.

In an article entitled "The Court of Review," *ante*, p. 142, Mr. W. W. King, Associate-Registrar of the Court, in discussing the residual jurisdiction of the Court of Review, mentioned, *inter alia*, the difficulties which will arise under s. 82 of the Mortgagors and Lessees Rehabilitation Act, 1936, in particular, the necessity for the Court to determine the meaning of the words "to sell or otherwise dispose of." The article concludes that these words would appear to cover "sale, lease, or mortgage," and refers to the discussion of the word "disposal" in *United Insurance Co., Ltd. v. The King*, [1938] N.Z.L.R. 885.

This section is a typical instance of the difficulties and anomalies which arise from the introduction of new legislation without proper discussion and consideration, and, while it is difficult to determine with any certainty precisely what transactions the Legislature has intended to prohibit, it is respectfully submitted that it is very doubtful whether the words "to sell or otherwise dispose of" do cover mortgages or leases. It would perhaps be as well to quote the first paragraph of subs. (1) of s. 82 in full:

> "(1) Where the amount secured on any land has been reduced by the operation of section forty-two of this Act, or where the rent of any land has been reduced by the operation of subsection one of section forty-four of this Act, or where any arrears of rent have been remitted in whole or in part by the operation of subsection two of the said section forty-four, it shall not be lawful, except with the leave of the Court, granted upon such terms and conditions as the Court thinks fit, for the owner for the time being of the land or of any part thereof, or of any interest in the land or in any part thereof, *to sell or otherwise dispose of the same* at any time before the first day of January, nineteen hundred and forty-one."

It was obviously the intention of the Legislature to prevent a mortgagor or lessee, who has obtained a reduction in the amount of his mortgage or in the rental or arrears of rental of his lease as the result of an adjustment under this Act, from making a profit out of the adjustment by disposing of his land or his lease before January 1, 1941, for a higher value than was determined by the Commission without first repaying to his mortgagee and other creditors the amount of his adjustable debt. It may be that the Legislature intended to include mortgages and leases in the restricted transactions, but it is submitted that the words of the section do not express that intention.

The section contemplates two classes of owners—namely, owners of freeholds and owners of leaseholds—and it is proposed to deal in this article only with the application of this section to the owner of freehold land who has obtained a reduction in his mortgage under s. 42 of the Act.

There is no doubt as to the meaning of the word "sell," but the significance of the words "or otherwise dispose of" will no doubt exercise the minds of lawyers during the next eighteen months.

The owner of land may deal with it in many ways. He may transfer for valuable consideration or as a gift; he may mortgage; lease for a period, with or without a compulsory or optional purchasing clause; he may create a trust; dispose of it by will; create a rent-charge; and he may grant an option to purchase.

In the particularly loose construction of this section, it is difficult to predicate with any certainty which of these dealings, apart from a transfer, would be included in the expression "to sell or otherwise dispose of the land," but the most practical question is whether a lease, a mortgage, or an option to purchase is included in the prohibition.

In *United Insurance Co., Ltd. v. The King* (*supra*) the meaning of the word "disposal" was discussed in relation to s. 23 of the Land Agents Act, 1912, the relevant part of which is as follows:—

> "(1) All moneys received by a land agent in respect of the sale, lease, or other disposal of land *or of any interest in land*, or in respect of any other transaction in his capacity of a land agent, shall be applied as follows: . . . "

Apart from the fact that the section specifically includes a lease, it differs from s. 82 in that it refers to the disposal of land *or of any interest in land*. These latter words enlarge the meaning to include many transactions other than an absolute sale, and would of themselves include a lease. It is submitted, however, that in s. 82 the prohibition is not of selling or otherwise disposing of "*the land or any interest in the land*," but, in the case of owners of the freehold, of disposing of the *land* itself. That is, the two classes of tenure contemplated by the section must be distinguished, and the word "same" receive a different meaning in the case of owners of freeholds and leaseholds, namely:—

(*a*) It shall not be lawful for the owner . . . of the *land* or any part thereof to sell or otherwise dispose of the *same* . . . (*i.e.*, the land).

(*b*) It shall not be lawful for the owner *of any interest in the land* (*i.e.*, a lessee) or any part thereof to sell or otherwise dispose of the *same* (*i.e.*, his interest in the land).

Read thus, the prohibition against the owner of the freehold is not of disposing of his *land or any interest in the land* but of disposing of the *land* only.

A lease is not a disposal of land but of "an interest in land," and, if the above distinction is a proper one, it would be difficult to hold that to lease for a term of years was to otherwise dispose of the *land*. If, therefore, such a lease is not unlawful, it is logical to say that it is open to an applicant wishing to sell to evade the section by granting a lease for 999 years at a peppercorn rental in consideration of a cash payment. Of course the consent of the mortgagee would have to be obtained to the lease, which would have to be registered, and no doubt the mortgagee would look after his own interests, but this would not protect the applicant's other creditors.

On the other hand, if to lease without the consent of the Court is unlawful, does the section mean that the sanction of the Court is necessary to every agreement to lease granted, for instance, by the owner of a block of flats or shops whose mortgage has been reduced under the Act? If so, one can picture the Court of Review being inundated with applications for consent to lease, leaving irate landlords to contemplate their vacant tenements while the applications are pending.

As far as mortgages under the Land Transfer Act, 1915, are concerned, s. 102 of that Act reads as follows:—

> "A mortgage under this Act shall have effect as *security*, but shall not operate as a transfer of the estate or interest so charged."

It could hardly be contended, therefore, that to mortgage was "to sell or otherwise dispose of the land." But if it is not unlawful to mortgage the land, there is nothing to prevent an applicant, who has obtained a purchaser for a sum in excess of his mortgage, from giving a second mortgage to the purchaser, making immediate default, and permitting the second mortgagee to buy in the land under his power of sale. This obviously is one way in which the provisions of the section could be evaded.

Consideration must also be given to leases with optional and compulsory purchasing clauses; for instance, a lease for a term to expire on January 2, 1941, with an optional purchasing clause would not require to be registered, neither would it require the consent of the mortgagee. Nevertheless, it would permit the owner to dispose of the land without infringing the provisions of s. 82. But perhaps the most outstanding illustration of the possibility of the purpose of the Act being evaded lies in the option to purchase. It can hardly be contended that to grant an option to purchase to be exercised on January 2, 1941 (the consideration for the option being the amount of the purchase price), is to sell or otherwise dispose of the land, and yet it is open to any applicant to evade the obvious intention of the section in this manner to the disadvantage of his mortgagee and other creditors.

While the purpose of this article is not to attempt an interpretation of this section, but merely to indicate the difficulties arising out of its application, it would seem that the words "to sell or otherwise dispose of" include a transfer, or an agreement for sale and purchase, a declaration of trust, a disposal by will, and lease with a compulsory purchasing clause; but apart from a mortgage, a lease, and an option to purchase, which it is submitted do not come under the prohibition, it is doubtful what other transactions are contemplated.

It may be said it is patent that the Legislature wished to prevent all such transactions being effected, but it is interesting to compare with this section the provisions of s. 58, which imposed restrictions on applicants while the applications for adjustment were pending:

> "(1) Every mortgagor . . . who, while any application for adjustment . . . is pending,—
>
> "(*a*) Without the consent of the Adjustment Commission, granted upon such terms and conditions as the Commission thinks fit, *mortgages, charges, pledges, or creates any lien upon or otherwise encumbers any part of his property, or transfers, assigns, or parts with the possession or control of any part of his property* otherwise than in the ordinary course of business . . . shall be liable to the penalties . . . "

It may be contended that the Legislature intended to place this same restraint on adjusted applicants under s. 82, and it may be that it should have done so, but, unfortunately perhaps, it has not said so. The same language could have been repeated in s. 82, but, as different expressions are used, it can only be assumed that the Legislature did not intend the restrictions in s. 82 to be as comprehensive as in the former section.

Another loose expression used in this section is that of "owner *for the time being*." It might quite logically be concluded that this term was intended to cover the personal representatives of an applicant who died prior to January 1, 1941, but it has a wider application than this. For instance, if a man purchased land from an adjusted owner with the sanction of the Court, he would be prevented from selling or otherwise disposing of that land himself before January 1, 1941, without first applying to the Court for leave to do so. Again, even if the land had been sold with the Court's consent, and the mortgage discharged, the land could not be disposed of before January 1, 1941, without the sanction of the Court. Therefore, until January 1, 1941, any land, the mortgage over which has been adjusted, will always be subject to the restrictions of s. 82 no matter how often it changes hands.

It is the intention of this article not to indicate to the unscrupulous mortgagor the means of evading the provisions of the Act, but to emphasize the anomalies which may arise from this section. It is inevitable that the section under consideration will sooner or later have to be referred to the Supreme Court or the Court of Review for an authoritative ruling, but recent events have shown that the ultimate result of an expensive test case is but to provoke a piece of retrospective legislation which leaves the litigants with nothing but heavy bills of costs to reward them for indicating to the Government the inadequacy of its enactment. It is very desirable for all concerned that the Attorney-General reconsider this section immediately, and clarify the position with an amending Act.

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. 121. Motion by State Advances Corporation of New Zealand on behalf of applicant in pursuance of s. 82 of the Mortgagors and Lessees Rehabilitation Act, 1936, for leave to mortgage, after adjustment and capital reduction under s. 42 of the Act, applicant's interest in his land, for the purpose of the erection of a dwellinghouse, which was necessary for the successful carrying-on by the applicant of his farming operations.

An order granting such leave was made, the Court of Review making the following memorandum: "While reserving the question as to whether a *bona fide* mortgage, as is the case here, is a disposition under s. 82, in case full argument is desired to be presented to the Court, the Court as at present advised is of opinion that such a mortgage is not a disposition under s. 82."

Social Security Charge and Maintenance and Alimony.—The present incidence of the Social Security Contribution and of income-tax in respect of payments of a wife's maintenance, referred to in a leading article, *ante*, p. 105, is to be removed by early legislation, according to a statement made yesterday by the Prime Minister, unless the maintenance moneys are paid out of a trust fund created by a settlement so that the income has not already borne tax; but this will not extend to alimony paid by a man to his former wife after divorce. Pending the passing of the amending legislation, a separated wife need not include the payments of maintenance in her declaration of income.

Testator's Family Maintenance.

A Consideration of the New English Statute.

By A. C. Stephens, LL.M.

Complete freedom in regard to alienation of property by will is exceptional. Until recently, the law of England stood in marked contrast to other systems of law in this respect, but, last year, the Imperial Parliament passed the Inheritance (Family Provisions) Act, 1938, which contains provisions similar in some degree to those contained, in New Zealand, in the Family Protection Act, 1908. Scotland is excluded from the application of the English Act, because Scottish law already contains certain restrictions on testamentary disposition.

The extent of the difference between the English and New Zealand statutes is very considerable, as will be seen from a comparison on the following points :—

Domicil.

The operation of the English statute is limited to the wills of persons dying domiciled in England. The New Zealand Act contains no such restriction, and the Court has applied the Act in the case of immoveable property situated in New Zealand, even though the testator died domiciled abroad. Under such circumstances, however, it has been held that the Act does not authorize an order to be made in regard to moveables, even if situated in New Zealand, as the law of succession to moveables is the law of the domicil.

Applicants for Relief.

Under the New Zealand Act, the widow or widower, as the case may be, and any child, may apply, but the English Act restricts the right to (*a*) widow or widower; (*b*) a daughter who has not been married or who is by reason of some mental or physical disability incapable of maintaining herself; and (*c*) a son who is an infant or who is by reason of some mental or physical disability incapable of maintaining himself.

Whatever may be said about the other restrictions, it is difficult to appreciate the reason for the exclusion of a daughter on the simple ground of marriage.

Condition of Relief.

Under the New Zealand Act the testator must die "leaving a will without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children." The English Act applies if the Court is of opinion that the will "does not make reasonable provision for the maintenance of the dependant." "Adequate" provision would be "reasonable," and *vice versa*; and it is questionable whether "support" is wider than "maintenance," but the omission of the word "proper" from the English statute is important in view of the decision of the Privy Council in *Bosch v. Perpetual Trustees Co., Ltd.*, [1938] A.C. 463, that "proper" means something different from "adequate."

Special Limitation in England.

No application at all can be made when the deceased has bequeathed not less than two-thirds of the net estate to a surviving spouse and the only other dependants are children of such spouse. It may be that this restriction is not unreasonable on the whole, but it is easy to imagine special circumstances in which it would cause hardship.

Extent of Relief.

The English Act empowers the Court to order

> "that such reasonable provision as the Court thinks fit shall . . . be made . . . for the maintenance"

of the applicant. The New Zealand Court may order

> "that such provision as the Court thinks fit shall be made . . . for such wife, husband, or children."

The slight differences between the two Acts do not seem to create any distinction between England and New Zealand in regard to the extent of relief. It is an implied condition in the New Zealand Act that the provision should be reasonable. This is an express condition in England. It is further provided in England that the provision is for the *maintenance* of the applicant. This also is the effect of the New Zealand statute, although the word "maintenance" is not used: see *Stephens's Testator's Family Maintenance*, 15.

There are, however, certain express limitations contained in the English Act.

(*a*) The Court's order cannot affect capital unless the net estate does not exceed £2,000; and, even then, the whole estate cannot be dealt with. In New Zealand, the provisions ordered by the Court may be a lump sum, or a periodical or other payment.

(*b*) When the net estate exceeds £2,000, provision in England can be made only out of income, to the extent of two-thirds if the deceased leaves a surviving spouse and children, and one-half if the deceased leaves a surviving spouse or children. There is no such limitation in New Zealand.

(*c*) An order under the English Act *must* provide for termination of relief, in the case of wife or husband, on remarriage, and, in the case of children, on death, cesser of disability, marriage (when applicant is an unmarried daughter), and attainment of twenty-one years (when applicant is an infant son). There is no similar provision in New Zealand; but the Court has power to inquire whether circumstances have changed, and to discharge, vary, or suspend its order or make a new order.

Relevant Circumstances.

In New Zealand the Court has always taken all relevant circumstances into account, although there is no indication in the statute to that effect beyond a power to refuse an order to an applicant whose character or conduct is such in the opinion of the Court as to disentitle him to the benefit of an order. The English Act specifically requires the Court to have regard to any past, present, or future capital or income of the dependant, to the conduct of the dependant in relation to the deceased and otherwise, and to any other matter or thing which in the circumstances of the case the Court may consider relevant. The English Court is also required to have regard to the testator's reasons, so far as ascertainable, for making the dispositions contained in his will, or for failing to make provision for a dependant, and it may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the deceased and dated, but so, however, that in estimating the weight, if any, to be attached to any such statement, the Court shall have regard to all the circum-

stances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement. The position in New Zealand in regard to such statements of the testator is not settled. They appear to have been taken into account on one occasion, but the report of the case is not clear on the point: see *In re Gair, Davidson v. Sundstrum*, (1913) 33 N.Z.L.R. 212. The wishes of the testator as shown by his will are taken into account in New Zealand.

TIME-LIMIT FOR APPLICATION.

The period fixed by the English Act is six months from the grant of probate. This is the same as the original period in New Zealand, which has been extended to twelve months with a provision for further relaxation in the discretion of the Court.

AN UNSATISFACTORY COMPROMISE.

There can be little doubt that the English Act is a compromise between the views of liberal and conservative lawyers. One of the latter class, in a lecture on the Act, said that he had always regarded the restrictions on testamentary disposition prevailing in Scotland and France as survivals from the laws of our savage ancestors, and that he had heard of the passing of the Act with "amazement and shock" and had read with equal surprise the passage in a New Zealand judgment: "in almost every civilized State, testamentary disposition has been controlled or limited." The passage quoted was taken from the judgment of Stout, C.J., in *Parrish v. Parrish*, [1924] N.Z.L.R. 307, 312. One hesitates to think of the reaction of the above-mentioned lecturer if he had read the new German law in regard to wills, which declares invalid all wills which run grossly counter to healthy public sentiment, or which offend the considerations that a responsible testator should entertain towards family and community, or leave valuables to a society inimical to the State, or pass over an Aryan next-of-kin in favour of a Jew, or which are made through exploitation of the testator's last agony!

It is understandable, therefore, that, in view of the attitude of mind above exemplified, there must have been considerable difficulty in England in securing the passing of any statutory provision at all which would limit testamentary power over property. It is very regrettable, however, that the Imperial Parliament did not follow the lead given by our Dominion. Here we have a statute, simple in its essential provisions, which has worked satisfactorily for nearly forty years, and has been adopted in all the States of Australia with little alteration, and on which a large body of case law has been built up. Yet, in England, they pass a measure limited in its application and complicated in its terms, which cannot but work hardship in some cases in the very department in which it is intended to give relief.

Those who were responsible for the framing of the English Act could with advantage have shown greater confidence in their Judges, and given them the free discretion which is allowed in New Zealand. One often hears of children failing to profit by the experience of their parents. Is this a case of the parent failing to avail himself of the experience of his children? A careful examination of the English Act does not show any improvement whatever on the Dominion provisions, and a serious defect in our legislation—that is, the failure to cover the case of a man deliberately divesting himself of his property in his lifetime in order to defeat the claims of dependants after his death—has not been touched. One English solicitor (of the liberal type), in commenting on the English Act, expressed the opinion that it does not go far enough; and he made the point that it strikes at "the inadvertent, and not at the malicious." The same remark applies to our own statute. One would have hoped that the Imperial Legislature might have given us a lead in this respect.

Another important result is that English cases will require to be scrutinized with care to see if they are applicable in New Zealand.

Correspondence.

Law in the Modern State.

The Editor,
NEW ZEALAND LAW JOURNAL.
DEAR SIR,—

I looked for an adequate reply in your last issue to the report of Professor Julian Stone's address "Law in the Modern State," *ante*, p. 111. In the meantime let me heave a brick.

The publication, by the Lord Chief Justice of England, of the present dangers to democracy, has made unnecessary any effort to repeat or summarize what he has said. But in New Zealand for many years past the strongest presentation of the doctrine that "*laissez-faire*" is a "failure to recognize realities"; that "social control can do for industry what industry cannot do for itself," and that there must be "recognition of social responsibility for the progress and orientation of economic institution," has come from those occupying positions in our University Colleges, other than that of Professor of Law.

As practising lawyers we draw issue with Professor Stone when he asserts a change in essentials. We deny that the root principles of contract and tort, upon which our whole structure of "Law" rests, differed in the 19th century from those of the 17th or to-day. We claim that the root principle of democratic justice—freedom of property and person save at the judgment of a free and independent Judge—has not altered.

Professor Stone's philosophy, converted from academic terminology to ordinary language, is that a fat and placid serf is of more value to the "social institution" than a hungry and discontented freeman; that Russia's Communism and Germany's Fascism foretell our bureaucracy; and that only the few foolish ones who shut their eyes to "world-changes" really believe that within the next few years they will have liberty to act, speak, or think for themselves.

We, as a profession, remained silent and acquiescent when the small group of academic philosophers of the same brand, whom the Right Hon. J. G. Coates gathered around him, wrote into the statute-books the doctrine of expropriation without compensation and denial of access to the Courts. It is surely time that one of us heaved a brick. To seek a common jumping-off ground, does Professor Stone agree with the proposition that the freedom of British democracy was won for us by English Judges; has been maintained during some four hundred years for us by British Judges; and exists in New Zealand to-day *solely and entirely* by virtue of New Zealand Judges?

I am, &c.,
M. H. HAMPSON.

Rotorua,
June 19, 1939.

The Late Sir Thomas Wilford, K.C.

Tributes from Bench and Bar.

Following the death of Sir Thomas Wilford, K.C., there was a large attendance of Wellington practitioners in the Supreme Court on the morning of June 26. On the Bench were His Honour the Chief Justice (Rt. Hon. Sir Michael Myers), the Hon. Mr. Justice Blair, the Hon. Mr. Justice Smith, the Hon. Mr. Justice Johnston, and the Hon. Mr. Justice Northcroft.

The Attorney-General, the Hon. H. G. R. Mason; the Solicitor-General, Mr. H. H. Cornish, K.C.; the President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C.; the President of the Wellington District Law Society, Mr. A. T. Young; and Messrs. C. H. Weston, K.C., and P. B. Cooke, K.C., occupied the front row of the Bar seats.

Among those present in Court, in addition to the members of the Wellington Bar, were Mr. J. L. Stout, S.M., J. H. Luxford, S.M., W. F. Stilwell, S.M., A. M. Goulding, S.M., Chief Judge Jones of the Native Land Court, and Commissioner D. J. Cummings. Mr. H. M. Rogerson, President of the Auckland District Law Society, also attended.

The Attorney-General.

When their Honours had taken their places on the Bench, the Attorney-General, the Hon. H. G. R. Mason, was the first to address them.

"We desire this morning to do honour to the memory of the late Sir Thomas Wilford," he said. "For many years Thomas Wilford practised at the bar in this city. He was an advocate of distinction; excelling particularly in the sphere that was most congenial to him, that of trial by jury.

"His gift of speech and his personality won for him, at an early age, prominence in public life, and for a quarter of a century he represented the same constituency in Parliament. He attained Cabinet rank, and for a time was Leader of his Party. Subsequently, after again holding office in the Ministry, he was appointed High Commissioner for New Zealand.

"As a Parliamentarian the late Sir Thomas was an effective and accomplished debater; and the contributor of much that was positive and constructive to the councils of the people's representatives. As a Minister, as also previously as the first Magistrate of this city, he showed himself a just and efficient administrator.

"During the War, by his speeches, Sir Thomas rendered signal service to his countrymen by sustaining their faith in the ultimate victory of Britain and her Allies. He never doubted that our cause would triumph, and in the darkest days of the War his confidence brought cheer and comfort to many anxious and troubled minds.

"New Zealand has been fortunate in her High Commissioners—in none more so than in Sir Thomas Wilford, who discharged the duties of his high office with dignity and zeal. To him the work was a labour of love, and it was well done.

"Sir Thomas has passed from among us after a life well and fully lived. We remember gratefully what he has done for his fellows and the State in his day and generation. We also remember his essential kindliness, his urbanity, and his ever cheerful and winsome humour.

"Among those of our number who mourn him our sympathy goes out to his partner and friend of so many years, our very dear and much respected brother, who happily is still with us, Mr. Phineas Levi.

"To Lady Wilford, the life-long sharer of his struggles and his triumphs, and to the members of her family we respectfully offer our very respectful and sincere condolence."

Wellington Law Society.

The President of the Wellington District Law Society then addressed their Honours, and said they were assembled in Court to do honour to the memory of a very distinguished former colleague.

"The Attorney-General has spoken of some of the many achievements of the late Sir Thomas Wilford, and others, in other places, have spoken and will hereafter speak of his many and various attainments both public and private. It is not my intention here to-day to catalogue those great attainments. We of the Wellington Bar claim a more intimate and more personal knowledge of him than it has been the privilege of most others to enjoy," the President proceeded.

"For thirty-eight years prior to 1929 the late Sir Thomas Wilford was an active member of this Society. He was, accordingly, in daily contact with his fellow-practitioners, by whom he was held in the highest regard.

"His success as an advocate was a personal triumph. Probably his most outstanding legal achievements were at the criminal bar, where, in addition to his legal knowledge, he had that sound knowledge of human nature which is given only to a few.

"In Court, he was both courteous and helpful to less experienced counsel; and I personally am glad to be able to take this opportunity of expressing gratitude for help and encouragement received at his hands."

Mr. Young went on to say that Sir Thomas Wilford's talents were such as to carry him to the head of the profession, and it was only fitting that he should have held the high offices of Attorney-General and Minister of Justice. So versatile was he that it was, perhaps, inevitable that the profession should sooner or later lose him as an active practitioner; and, in 1929 when he took silk, he left these shores in another capacity to render distinguished service to this Dominion.

While Sir Thomas had not practised at this bar since 1929, Mr. Young said that Wellington practitioners counted themselves fortunate that he should have been amongst them as one of them so recently as December last, when he was present and spoke at a happy gathering in this very building, to celebrate the eightieth birthday of his former partner, Mr. Levi.

On that occasion he had seemed in the best of health and spirits. He had shown himself the same genial personality and the same witty speaker that the profession had learnt to like and respect. It was perhaps fitting that his last meeting with the profession should have been in happy vein, and the happy recollection of that last meeting with him would remain evergreen with the profession.

In conclusion, Mr. Young added: "It now remains for me to say that the members of the Wellington District Law Society desire to associate themselves

with the many tributes which have been paid to the memory of the late Sir Thomas Wilford, and to express to Lady Wilford and her son and daughter the heartfelt sympathy of the legal profession."

THE NEW ZEALAND LAW SOCIETY.

The President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., was the next speaker.

"I desire to associate the profession throughout New Zealand with this public expression of our regret at the passing of Sir Thomas Wilford," he said. "I am sure that lawyers throughout New Zealand would desire this, as they would also desire me to join them in the expression of our deepest sympathy to Lady Wilford, to her son and daughter, and also to Mrs. Wilford, the very aged mother of Sir Thomas.

"It is as lawyers that we meet to-day, and it is with Sir Thomas as a lawyer that we are at the moment chiefly concerned. His merits as a lawyer have already been extolled; and, if I might add something, it is this: to say that as a *nisi prius* advocate—as an advocate before juries—he was in his time surpassed by none, and equalled by very few.

"We should not, however, overlook the fact that Sir Thomas's career was a career of varied achievement: barrister, legislator, business man, High Commissioner. What variety, what versatility! And, in each sphere, a success.

"Finally (and in this I would like to express a personal note, because of my early association with him), I would speak of his attractive and loveable friendly personality, his ever readiness, in my experience, to encourage and assist. We deeply regret his passing."

THE CHIEF JUSTICE.

His Honour the Chief Justice, on behalf of the members of the Supreme Court Bench, then addressed the Attorney-General and members of the Bar. He said:

"It was with feelings of deep regret no less than your own that we heard first of the serious illness, and later of the death, of Sir Thomas Wilford. Although it is some years now since he made his last professional appearance, it was in this Hall of Justice that for the most part he made his name and fame as a member of the Bar. He had all the qualities which go to make up the successful *nisi prius* advocate—a sound knowledge of affairs and judgment of human nature, fluency of vocabulary, a keen sense of humour, a good temper, and withal a fine personal presence.

"It was but natural, with his temperament and qualities, that advocacy on the *nisi prius* side should appeal most to him, and I have no doubt that from the outset of his career it was his ambition and his determination to excel in that branch of professional work. And excel he did. From the very first his powers of cross-examination and his great influence in persuading juries to his point of view coupled with the other qualities I have mentioned made him a most formidable opponent. No one knows that better than I, for I suppose that there is no one living who was more often opposed to him than I was. But he had a great capacity for friendship, and those who were most often opposed to him were amongst his best friends.

"He had ambitions outside the law, and held high positions in the State. But we as lawyers are not concerned with those activities. On an occasion such as this when we meet here to mourn the loss of one of our friends we think of him mainly in his professional character. The last occasion on which Sir Thomas appeared in this Court was when he took silk and was called within the Bar. Very shortly afterwards he left to take up the position of High Commissioner for the Dominion in England. I know that he looked forward then—as I did—to the resumption of his professional career on his return to New Zealand. For various reasons, however, when he did return, he decided against that course.

"Consequently, to many of the practitioners of to-day he was unknown, but to his contemporaries and particularly those who were in the habit of meeting him in friendly rivalry his memory will be for ever fresh. The Judges join with you in your tribute to our departed friend and in your expression of sincere sympathy to Lady Wilford and to the late Sir Thomas's mother and the other members of the family in their bereavement."

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, at 11 a.m. on Friday, June 16, 1939.

The following Societies were represented: Auckland, represented by Messrs. W. H. Cocker, A. H. Johnstone, K.C., J. B. Johnston, and H. M. Rogerson; Canterbury, Messrs. J. D. Godfrey and J. D. Hutchison; Gisborne, Mr. J. V. W. Blathwayt; Hamilton, Mr. H. J. McMullins; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. W. T. Churchward; Nelson, Mr. J. Glasgow; Otago, Messrs. A. C. Stephens and A. I. W. Wood; Southland, Mr. T. R. Pryde; Taranaki, Mr. C. E. Monaghan; Wanganui, Mr. A. D. Brodie; Westland, Mr. J. W. Hannan; and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and A. T. Young. Mr. P. Levi, Treasurer, was also present.

The President, Mr. H. F. O'Leary, K.C., occupied the chair, and welcomed those delegates who were attending the Council for the first time.

Juries in Civil Cases and Special Juries.—The Auckland Committee reported as follows:—

"At the request of the Auckland Committee I enclose herewith the Committee's final report on three of the questions submitted to them.

"They have not yet completed their report upon juries in civil actions, but hope to forward it to you in the near future.

Enclosure.

"Final report of the Auckland Committee regarding the following questions:—

"(1) Whether the grand jury should be abolished?

"(2) Whether the right of the Crown to order common jurors in criminal cases to stand aside should be abolished; and whether the provisions of s. 120 of the Juries Act, 1908, which confers a right of peremptory challenge upon the Crown should be repealed?

"(3) Whether the law relating to the qualification of special jurors and the conditions upon which a special jury may be had should be amended?

"An interim report on these matters was submitted by the Committee in September, 1938, and referred to the District Law Societies. Replies were received from the

Auckland, Hamilton, Taranaki, Wanganui, Hawke's Bay, Wellington, Canterbury, Otago, and Southland Societies. The Committee have considered the replies and now beg to report as follows :—

" (1) As to the abolition of the grand jury :

" All the above-mentioned Societies favoured the retention of the grand jury. The Committee, therefore, recommend that no action be taken.

" (2) As to the right of the Crown to order jurors to stand aside ; and as to peremptory challenges by the Crown :

" There was a considerable difference of opinion as to whether the Crown should be permitted to exercise the right of standing jurors aside and also of challenging them. Auckland, Hawke's Bay, and Southland thought that the right to order jurors to stand by should remain as at present, but that s. 120 of the Juries Act, 1908, should be repealed. Hamilton, Taranaki, Wanganui, and Otago were for leaving the law as it now stands. Wellington agreed that the right to ' stand by ' should be retained, but considered that s. 120 should not be repealed without further consideration. Canterbury favoured abolition of the Crown's right of ' standing by,' but thought the right of peremptory challenge should remain.

" It will thus be seen that four Societies thought that no change in the law is desirable ; four were of opinion that the right of ' standing by ' should be retained, and of those four, three favoured the repeal of s. 120, whilst one desired that further consideration should be given to the question of repeal. One Society favoured the abolition of the right of ' standing by,' but considered that the Crown should retain the right of peremptory challenge.

" The Committee, therefore, thinks that the Crown's right of ' standing by ' should be retained, and, since the weight of opinion is in favour of retention of the right of peremptory challenge, it recommends that no action be taken.

" (3) As to special juries :

" The opinion of all the Societies was that some change was desirable, but there was considerable difference of opinion as to precisely what change should be made. The Committee, after considering the whole of the replies, recommends that the law be amended to provide :

(*a*) That the names to be entered in the special jury book should be of those persons who are known to the Sheriff to be, or by their descriptions appear to him to be by reason of their education, occupation, or training, capable of understanding evidence concerning business, mercantile, banking, scientific, or technical matters.

" (*b*) That a special jury of twelve or of four may be granted by a Judge upon the application of either party in any case where, in his opinion, a knowledge of business, mercantile, banking, scientific, or technical matters may be necessary in order to understand the evidence to be adduced at the trial."

Mr. Stephens pointed out that the Law Revision Committee had adopted a draft Bill which it was hoped to introduce this session, and which contained possibly wider terms than 3 (*a*) and (*b*) in the above report.

It was unanimously decided that the recommendation of the Committee should be adopted, and that the report should be forwarded to the Attorney-General with a request that if possible a member of his Department should confer with the Society with a view to co-ordinating the suggestions in the Report and in the Bill.

Examinations for Barristers and Solicitors.—Reports were received from seven Societies, the Auckland, Wellington, and Otago Societies reporting at length.

The President pointed out that the general idea seemed to be that the course should be altered.

It was stated that the Auckland Society favoured slight changes only, while the Council was informed that the profession in Otago was definitely opposed to the present syllabus because it did not sufficiently emphasize technical subjects. It had been drawn up by the Law Faculties, but what was wanted was the opinion of practitioners.

Mr. A. H. Johnstone pointed out that the Council of Legal Education had considered almost every law course in the British Empire and many of those in the United States before coming to a decision. The question of reciprocity of admission had had to be considered, and it had been apparent that our standards were too low and that candidates here would not pass at such a University as Melbourne. This had been commented on by Australian examiners who had set papers in our legal subjects. The Council had tried to raise the cultural standard of barristers, and to alter the system so that candidates would be well grounded in principles rather than in details. Delegates must remember that there had been a carefully considered report, which, after approval by the New Zealand Law Society, had been sent on to the University and had been brought into effect. The University would be slow to alter the course, which must be given a trial and which might not work out as badly as thought, as its whole object was to raise the standard of the profession.

On the motion of the President, it was decided to send all the reports to Messrs. Stephens and Gresson for their consideration, with a request that they should report to the next Council meeting.

History of Administration of Justice in New Zealand.—The following report was received :—

" The President desires to report that, pursuant to the resolution of the Council at the March meeting, the Secretary and he on April 20 called on Mr. J. W. Heenan, Under-Secretary of Internal Affairs, and discussed with him the proposal to publish the suggested volume concerning the Administration of Justice in New Zealand during the last one hundred years.

" Mr. Heenan was informed that the Society was quite anxious and willing to proceed with the preparation of the volume, but that, as the expense would be heavy, considerable financial assistance from the Government would be required. The Society could find £200, but no more.

" Mr. Heenan stated that the Government was already committed to an expenditure of many thousands for the preparation of various volumes, none of which was on the scale apparently envisaged by the Society. He regretted that no assistance could be given, and suggested that the alternative idea of giving all the Legal Conference papers an historical bias should be adopted, as these could be published and form a permanent record."

It was decided that no further action should be taken.

The President mentioned that he had received a letter from Mr. C. A. L. Treadwell, who stated that he had been given access to a long series of letters written by the first puisne Judge in New Zealand—Mr. Justice H. S. Chapman—covering a period of about nine years from 1842. These letters had been edited by Sir Frederick Chapman, and Mr. Treadwell suggested that they should be published by the Society together with a biographical sketch.

It was considered, however, that the publication of such letters was not a matter for the Society, and the proposal was accordingly dropped.

Audit Regulations.

(*a*) **Joint Audit Committee.**—As no report had been received from the Committee, though it was understood that a meeting had been held and decisions agreed upon, the matters were held over until September.

(*b*) **Standard Form of Audit Certificates.**—The Taranaki Society wrote, stating that the work of auditors and Law Societies would be considerably simplified if a standard printed form of report were adopted and its use made obligatory. Suggested forms were enclosed for the information of the Council.

It was decided to approve the general principle of uniformity in audit reports, and to forward the

suggested forms to the Joint Audit Committee for its consideration and report.

It was also decided to ask each District Law Society to forward to the Committee any comments or proposals it desired to make.

Barrister or Solicitor acting for Local Body of which he is a Member.—Messrs. Godfrey and Hutchison forwarded the following report :—

"As requested by your Council, we have considered the question raised by the Wellington District Law Society as to the propriety of a member of a Borough Council acting as solicitor to that Council while carrying on general practice in the same borough.

"Rulings of the Bar Council set out on p. 2751 of the *1939 Annual Practice*, are as follows :—

"'*Member of County Council.*—A barrister should not appear either for or against a County Council of which he is a member.

"'*Member of Local Council.*—A barrister should not accept briefs from the Town Clerk when the barrister is a member of the local Council.'

"In *Cordery's Law Relating to Solicitors*, 4th Ed. 137, it is said :—

"'*In Litigation: Generally.*—In the opinion of the Council of the Law Society, as a general rule a solicitor who is a member of a public authority should not be professionally engaged against such authority in any proceedings to which such authority is a party or in any matter in which such authority is directly interested. If exceptional circumstances justify any departure from this general rule, it is the duty of the solicitor to ensure that the interests of the authority are effectively protected.'

"The rule laid down by the Council of the Law Society for the guidance of solicitors in the case of a possible professional engagement against the local body is, therefore, not absolute as is the rule laid down by the Bar Council for barristers; nor have we found anything in Cordery dealing with the question of solicitor members of local authorities acting for the local authority.

"In New Zealand the usual practice is for the local body to appoint a practitioner as solicitor to the local body, and to him are sent the instructions of the Council from time to time.

"We think—

"(*a*) That in cases where the work that has to be done is the type of work that a barrister does, the rule laid down by the English Bar Council should be followed.

"(*b*) That the appointment of a solicitor member of a Borough Council as solicitor to the Council would put him in a position in which his view as a practitioner and his view as a member of the Council might tend to conflict, with the result that one view would have to be subordinated to the other. Such an appointment might properly lead to public criticism and would tend to bring the profession into disrepute. We, therefore, think that it would be proper to rule that a solicitor member of a local body should not accept appointment as solicitor to that local body (that is, as regular solicitor).

"(*c*) There may, however, in New Zealand be exceptional cases in which in a small borough there are only one or two solicitors or firms of solicitors who are capable of doing the work required of a borough solicitor. In such a case, if the only available or suitable practitioner were a member of the local body, it would be necessary to appoint a practitioner outside that borough as solicitor to the Council. This would not, we think, present any very serious difficulty, having regard to the fact that distances are not very great and means of transport good. We are unable to agree whether, if such a course were pursued, it would be proper for minor matters to be occasionally handled on behalf of the borough by the solicitor member of the Council instead of by the borough solicitor. If this were thought proper, the provisions of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, show the outside limits of the casual employment of a practitioner member.

"Otherwise than as indicated in the last preceding paragraph, we have considered the matter apart from the section referred to."

It was resolved to adopt the report, to thank the Committee for their services, and to ask them to draft a ruling for circulation to the profession.

Social Security Act, 1938, Section 122 (3).—The Wellington Society forwarded for consideration the following letter which had been received from a practitioner :—

"At the last meeting of my Council the enclosed letter from a practitioner was considered, and it was decided to forward it to your Society with a request that it should be considered in due course.

"Would you kindly put the matter on the order-paper for the next meeting."

Enclosure.

"I wish to draw the attention of the Society to what appears to be a serious injustice effected by s. 122 (3) of the Social Security Act, relating to payment of tax on income other than salary or wages upon the death of a taxpayer, and suggest that the matter be put before the Minister by the Law Society.

"The effect of the section is that on the death of a person in receipt of income other than salary or wages, he and his estate will pay tax for one year more than a person in receipt of salary or wages. The position is clearly shown by the following example :—

"(*a*) Take the case of a man on salary or wages of, say, £500 a year who dies on, say, February 28, 1940. He commenced paying on his salary or wages from April 1, 1939, and ceases to pay on his death. He will, therefore, pay 1s. in the pound on income for eleven months—namely, on salary received from April 1, 1939, to February 28, 1940. The tax payable by this man will be £23 1s. 8d.

"(*b*) Take the case of a man receiving income other than salary or wages, say, £500 per annum, who dies, say, on February 28, 1940. During the year 1939–40 he will pay tax on £500 income received to March 31, 1939, the instalments being payable in May, August, and November, 1939, and February, 1940. According to s. 122 (3) upon his death his executors will be liable for tax on the income earned from April 1, 1939, to his death, February 28, 1940—11 months. The tax payable by this man and his estate will be £48 1s. 8d. This injustice applies not only to a man dying in the present financial year, but also to future years, the result being that a man on income other than salary or wages will always pay one year's more tax than a man on salary or wages, and what is more, tax is payable after his death when he is no longer able to receive any benefit under the Act.

"This position appears to have arisen by confusion with the principles governing income-tax, but it must be borne in mind that income-tax is payable in any year on the income received during the previous year whether salary or income other than salary."

It was decided to write to the appropriate Minister and point out the position.

(To be continued.)

Obituary.

Mr. Alexander Dunn, Wellington.

The late Mr. Alexander Dunn, who died on June 1, was born at Wellington in 1872, the son of James Dunn of Wellington, merchant. He was educated at Wellington College, where he was Dux in 1890. He completed his studies at Canterbury University College from 1891–1894, graduating B.A. in 1893, and M.A. and LL.B. in 1894.

The late Mr. Dunn served in the office of Messrs. Izard and Loughnan in Christchurch, and later with the Wellington firm of Messrs. Moorhouse and Hadfield. He commenced practice on his own account in Wellington in 1896, and remained in active practice until his death. Since 1938, the practice was carried on in partnership with his son, Mr. J. H. Dunn, and his daughter, Miss Julia M. Dunn.

Southern Westland.

Early Courts and Magistrates.

In the course of his address at the opening of a new Magistrates' Court at Wataroa, on May 19, the Attorney-General, Hon. H. G. R. Mason, recalled some early legal history in South Westland.

"The history of this part of New Zealand dates from the earliest days of European habitation of the country," he said. "The high mountainous land, between Okarito and Hokitika, was the first sight of New Zealand had by Abel Tasman, on December 13, 1642. Many years after this, whaling boats touched on these shores. There were spasmodic attempts to establish settlements, but these mostly failed until the discovery of gold in the 'sixties. The lure of gold brought thousands of people to the West Coast. Towns sprang up almost overnight, and, as the ground was worked out or proved unpayable, as quickly died away. Although there were thousands of gold-seekers, the West Coast, unlike many other places that had been the centre of a mining boom, had little serious crime, and cases of theft were exceedingly rare.

"One of the first Stipendiary Magistrates to hold sittings of the Magistrates' and Warden's Courts at Okarito was a one-time Indian Army officer, named Fitzgerald, whose iron hand earned for him the title of 'The Bengal Tiger.' In later years, Mr. Frank Bird carried out the offices of Stipendiary Magistrate and Warden at Wataroa, Okarito, and the country to the south."

The learned Attorney-General went on to say that many of the Courts were held on the spot where the case or dispute arose, and the miners would gather round to see justice done, and done in such a way that appeals were few. This was an illustration of the view that the object of the judicial office was not the rigid administration of the law, but, primarily and fundamentally, the administration of justice, and justice, not as it appeared to the personal theory of an individual Judge, but as it appeared to the reasonable man, the good citizen. Judicial technique in totalitarian and in democratic States differed in approach. According to the one, the Judge was acting, in effect, as an instrument of the Government, whereas, according to the other, his sole function was to do justice between man and man. We in New Zealand thus owed a great debt to our pioneers, who framed our legal structure on the British tradition of individual liberty and justice.

Continuing, Mr. Mason said: "After the major gold rushes, the population of South Westland dwindled, and it was only within recent years that people had come to realize that there was a more permanent harvest than gold to be won from the soil of this part of the province. The sittings of the Court at Okarito were discontinued in August, 1927, and they were then held in the Wataroa Public Hall. Then, owing to the small amount of business and the difficulty of finding sufficient space for the Court records, the Court at Wataroa was closed for a time. It was reopened in April, 1936. Thus, for a considerable time, there were no regular sittings of the Court south of Hokitika; but, with the fresh development of the district, it had been realized that journeys to Hokitika entailed considerable loss of time and inconvenience to litigants from Wataroa and the surrounding district. It was axiomatic that all men were equal before the law, and that justice was available to all, but, if the costs are unduly excessive, they might virtually result in the denial of justice.

"The decision to build a Court-house at Wataroa was not made by the Government because it was felt that crime and litigation had increased in the district," Mr. Mason said in conclusion, "but rather to bring to the people of these parts the privilege of having their disputes heard in their midst, in accordance with the traditions of British justice."

Westland's First Bar Dinner.

The Attorney-General Honoured.

The complimentary gathering of West Coast practitioners at Greymouth on May 18, in honour of the Attorney-General, Hon. H. G. R. Mason, was the first Bar dinner held in Westland.

Mr. H. Lovell, who presided, expressed the regret of every one in the absence of Mr. H. W. Kitchingham, their President, whose absence was on account of ill-health. Through more than the sixty years during which he had been associated with the law, Mr. Kitchingham had endeared himself not only to the public, but also to all practitioners, by whom he was regarded with affection. Mr. Lovell felt sure he was expressing the wish of all present when he hoped that Mr. Kitchingham would soon be restored to health again.

Apologies for non-attendance were read from Mr. J. O'Brien, M.P., who was also absent on account of ill-health; Inspector McLean; Messrs. A. A. Wilson, Westport; M. J. James, Hokitika; A. H. Paterson, Greymouth; and J. A. Murdoch, Hokitika.

In proposing the toast of the Attorney-General, Mr. Lovell said that he was sure he voiced the sentiments of all members of the profession on the Coast when he said they were delighted to have this opportunity to entertain the Hon. Mr. Mason in his dual capacity as Minister of Justice and Attorney-General. Mr. Mason had held those positions for more than three years, and solicitors everywhere were unanimous that he had discharged the high duties of his office with credit to himself, and with satisfaction to the public and to the members of the legal profession.

The Attorney-General's Activities.

"The profession particularly has reason to express gratitude to Mr. Mason for the manner in which he has safeguarded the interests of the profession," Mr. Lovell continued. "In these latter years particularly, members of the profession have been conscious of the fact that persistent inroads had been made on the various areas of work which the profession, in other times, felt was its own preserves, and these should be protected for lawyers. In the Westland District we find that land-brokers are doing a large amount of conveyancing, requiring a high measure of technical skill, and this raises difficulties later for the profession. Historically, from time immemorial, that is solicitors' work, and the profession's interests should be protected. We are all thankful to the present Attorney-General for doing all that he can to retain the profession's privileges.

"Another aspect of the Attorney-General's activities that appeals to us is the work that he is doing in connection with law reform, and in the provision of better buildings in which to carry on the administration of justice in the various towns. In the latter connection, he is opening a new Court-house at Wataroa to-morrow.

"With regard to law reform, the Minister had been generous enough to mention the co-operation he had received from the profession. That had been forthcoming largely because of the inspiration that had flowed from himself and his collaboration with the profession. A remarkable amount of work had been done since he assumed office, and the profession had found it a great pleasure to collaborate with him. All realized that the Minister is administering one of the most important portfolios in the Government, because it had been well said that the administration of justice and the maintenance of law and order was one of the first functions of the State. The Attorney-General is carrying out those duties in a manner that calls forth our warm approbation."

In conclusion, Mr. Lovell said it was a great privilege for them to associate with the Hon. Mr. Mason in his capacity as Attorney-General and head of the profession, and they felicitated him on the success that had attended his administration of his Department during the time he had held office.

The Spirit of the West Coast.

The Hon. H. G. R. Mason, in reply, thanked the Chairman and those present very sincerely for their kindness that evening, and for the way in which his health had been proposed and received. It was very happy for him to be there. He was not a West Coaster, but nevertheless his thoughts had an attachment to the Coast that they did not have to any other part of New Zealand. His grandparents had lived there, and his mother had lived there, and naturally he had heard much of the Coast. One knew a great deal of the early days on the Coast—the immense amount of work done, the energy and enthusiasm, the youthful animal spirits when they literally removed mountains in the search for gold. The people of those days had a comradeship and heartiness which made life very enjoyable and had given a sort of tone—he did not know a better word—a reputation, if they liked, to the West Coast. Certain ideas came to mind when the Coast was mentioned, and those ideas were of hearty goodfellowship and a spirit of co-operation. Such thoughts were revived in his mind by that night's kindness to himself.

Encroachments on the Profession's Work.

"I sympathize strongly with the idea that the profession cannot be expected to be carried on if the more remunerative part of its work is to be handed over to others," Mr. Mason proceeded. "If there is to be a profession to carry on the more difficult parts of the work requiring specialized skill and learning, then the profession must have the remuneration sufficient to carry on, and that cannot be if the other parts are encroached upon by unlearned persons. It is not reasonable or rational that the profession should merely be expected to live on the skim milk, while the cream is given to some one else. It has not come under my notice in very many places that there is any such trend, but it is a trend that should be resisted."

As to the work of law reform, the Attorney-General said that it was a matter of co-operation among the whole profession, and co-operation had not been lacking. That was not strange. No one knew better than the lawyer where the law was unsatisfactory, and, consequently, one rightly looked to the profession in that regard. After all, it was a profession—that was to say, it was a body of men who were not in business merely for what they got out of it, but who were animated by the spirit of serving—their client in particular, their country in general. It was fair that the profession should help, and one was glad to say that that help had been abundantly made available.

"I appreciate the fact that many have gathered here to-night, some of them from long distances, which meant much inconvenience to them in the way of travelling," the Attorney-General went on to say. "I congratulate the West Coast on the fact that there is a considerable amount of development going on, and I hope the agricultural development would be more certain than the gold-mines of the past, although they had been immensely rich. But as far as what brought me here is concerned—the opening of the new Court-house at Wataroa on the following day—that alone is a fact that shows you have a district developing. At present, like most new Court-houses, the sittings will not be very frequent, but more frequent sittings will be wanted as the district developed."

In conclusion, the Hon. Mr. Mason said he was very sorry that Mr. Kitchingham's ill-health did not permit of his being with them, as he was well remembered by all of them, and always with the kindest thoughts. There could be few in the profession so long associated with it as he, and few held by all in such happy memory. Kindliness was the first idea that occurred to one in thinking of Mr. Kitchingham. The Attorney-General added that he was also pleased that they had with them their Magistrate, Mr. Raymond Ferner, S.M., whom he had met in different associations in Auckland: he felt sure that the people of the West Coast would all have the same regard for him, as they had had for Mr. Raymond Ferner in other capacities in the North.

Bench and Bar.

The toast of the Bench and Bar was entrusted to Mr. W. Meldrum, formerly Stipendiary Magistrate, who said that it could safely be said that the Bench in New Zealand had proved itself one of which the country had every reason to be proud. As far as the West Coast was concerned, he had had thirteen years' experience on the Bench there, and he had always found great assistance from the Bar in dealing with any case. He coupled the toast with the name of Mr. Raymond Ferner, S.M., who had proved himself an exceedingly efficient Magistrate, well suited to the particular requirements of the district. He also linked with the toast the names of Mr. F. A. Kitchingham, Crown Solicitor, and Mr. A. R. Elcock, one of the leading solicitors in the Hokitika district.

Mr. Raymond Ferner, S.M., said that it must be on comparatively rare occasions that the toast of the Bench and the Bar was proposed by one so well qualified as Mr. Meldrum; and, replying on behalf of the Bench, he appreciated Mr. Meldrum's remarks very much. Mr. Ferner paid a tribute to the services rendered voluntarily by Justices, and said that the Magistrates and the Bench and the Bar fully appreciated their services. The administration of justice in New Zealand was entirely unfettered and free; and, in this connection, he wanted to say of the Attorney-General and the permanent head of the Justice Department that there

had never at any time been the slightest tendency for them to make any gratuituous or unwelcome suggestion to the Bench.

Replying on behalf of the Bar, Mr. F. A. Kitchingham said he felt honoured in doing so because he thought this was the only occasion honour had been paid to an Attorney-General in this manner on the West Coast. It was certainly the first occasion that all the practitioners on the West Coast had assembled for a Bar dinner. Theirs was an interesting profession and an interesting means of livelihood, and in West Coast towns in particular he thought they had a spirit of friendliness that was absent in the larger cities. There was the utmost friendliness between the Bench and the profession, and on behalf of members of the profession from all parts of the district he thanked Mr. Meldrum for his kind remarks.

Mr. A. R. Elcock thought that the affection and regard which the profession had for the Bench was borne out by the public. He also thought it was something of a record that Mr. Meldrum, after presiding over the local Court for fifteen years, had been elected Mayor of the town.

THE JUSTICE DEPARTMENT.

The toast of the Department of Justice was proposed by Mr. J. W. Hannan, who said that, if other parts of New Zealand received the same courtesy from the Department's officers as they did on the Coast, the Department had every reason to be proud of its appointees. Nobody had recognized more than the present Minister of Justice the necessity for comfortable provision for those making use of the Courts, and this fact certainly helped in the satisfactory administration of justice. They had no complaints about the Courts in that district.

In thanking the proposer of the toast for his remarks, Mr. B. L. Dallard, the Under-Secretary for Justice, said he was glad to hear the note sounded that night by previous speakers. His Department endeavoured to see that justice worked smoothly, and it did not in any way interfere with judicial discretion.

Classification of Law Lords.—The proposal of Mr. R. H. Parker, of Bombay, that the dissenting judgments of the House of Lords should not be reported has provoked the just condemnation not only of a clergyman but of Lord Dunedin himself, who declares that the proposal is "foolish and mischievous." "To suppress all dissenting judgments," says the famous Law Lord, "would be to cut out many *dicta*, and it is these stray (not *obiter*) *dicta* that are often of such value when an abstruse point of law falls to be decided, especially if they are the *dicta* of a Judge of the very highest class. For though you cannot rank Judges one, two, three as you do in the Mathematical Tripos, yet you can and do range them in classes. It would be invidious to mention names, but there is no doubt that a *dictum* of Cairns, Selborne, or Macnaghten is worth more than that of —— —— ——."

Of the J.C. practice of suppressing the dissentient opinions, Lord Dunedin thinks it "probable that the practice arose accidentally from the feeling that the Privy Council was not deciding the case, but only advising the King how to decide it, and the conflicting advice might puzzle the Monarch."

—APTERYX.

Practice Precedents.

Application to show Cause why Bail should not be Granted.

It is a fundamental principal of British justice that the liberty of the subject is always of paramount importance. In *habeas corpus* proceedings, before a rule *nisi* or summons can be issued, there is sometimes an *ex parte* motion for leave to issue the same. This application is therefore preceded by an *ex parte* motion for leave to issue the summons though the opinion as to the necessity of such an application is very divided. The order being made, the summons to show cause is issued. In the *ex parte* motion, as in *habeas corpus*, there no statute is invoked, and so none is given in the heading. But, in the summons, authority is found in the Crimes Act, 1908, and in the Judicature Act, 1908. Further, the general rule as to "headings" is employed; so that the title bears the words "In the matter of," &c.

The precedent is based on the English procedure adopted in the High Court of Justice, King's Bench Division, and referred to in *Short and Mellor's Crown Practice*, 2nd Ed. 284.

The granting of bail may be merely discretionary. This depends on the nature of the offence: see ss. 221 and 368 of the Crimes Act, 1908; and see, also, *In re Hewer*, [1935] N.Z.L.R. 883, for a statement of the principles upon which the Court will exercise its discretion. In that case a preliminary order does not appear to have been made or required.

In the precedent following, only one affidavit as to character is given; but more of the same nature should be furnished. If an *ex parte* motion is not filed, then the affidavit in support of the motion will be endorsed "Affidavit in Support of Summons." The better opinion would favour not filing a motion, but, in view of the fact that in two recent cases in Wellington an order on *ex parte* motion for leave to issue the summons was made, forms as to the preliminary procedure are here set out.

MOTION FOR ORDER FOR LEAVE TO ISSUE SUMMONS AS TO BAIL.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

HIS MAJESTY THE KING

versus

A. B. &c.

Mr. of Counsel for the above-named A. B. to move before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Court House on the day of 19 at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard FOR AN ORDER giving leave to issue a summons to C. D. Esquire Stipendiary Magistrate TO SHOW CAUSE why the said A. B. should not be admitted to bail UPON THE GROUND that there is no reason to fear that the accused will not appear if bail is granted AND UPON THE FURTHER GROUNDS set forth in the affidavit of E. F. filed in support thereof.

Certified pursuant to the rules of Court to be correct.

Counsel for accused.

MEMORANDUM FOR HIS HONOUR.—Counsel respectfully states that this procedure is based on the English procedure adopted in the High Court of Justice, King's Bench Division, and referred to in *Short and Mellor's Crown Practice*, 2nd Ed., under R. 111, at p. 284. Counsel also respectfully refers his Honour to *In re Hewer*, [1935] N.Z.L.R. 883.

Counsel moving.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

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

1. That I am a member of the firm of Messieurs X. Y. Barristers and Solicitors and have full knowledge of the matters deposed to herein.

2. That I am informed by the above-named A. B. and verily believe that the said A. B. was arrested at on the day of 19 on a charge of being in possession of forged bank-notes knowing the same to be forged.

3. That the said A. B. appeared at the Magistrates' Court at on the day of 19 before Esquire Stipendiary Magistrate and was remanded to appear at the Magistrates' Court on the day of 19 application for bail being made and refused.

4. That the said Esquire gave no reason for refusing the said application for bail.

5. That the said A. B. has not been convicted in any Court of any offence.

6. That if an order is made for leave to issue a summons in terms of the motion filed herein evidence will be brought to support the application for bail on the ground that there is no reason to fear that the said A. B. will not appear if bail be granted and on such other grounds as may be relevant.

Sworn &c.

AFFIDAVIT IN SUPPORT OF SUMMONS.

(*Same heading.*)

I of company manager make oath and say:

1. That I have been a resident of during the past years.

2. That I have known the above-named during the last years.

3. That to the best of my knowledge and belief the said is a reputable citizen and has always borne a good character.

4. That there is nothing that I know of which would lead me to believe that the said would not appear on the hearing of any criminal charge against him.

5. That I am the manager of the Company Limited a company duly incorporated under the Companies Act 1933 and carrying on business as at [*Number*] Street in the City of .

Sworn &c.

SUMMONS TO SHOW CAUSE WHY AN ORDER FOR BAIL SHOULD NOT BE MADE.

IN THE MATTER of the Crimes Act 1908 the Judicature Act 1908

AND

IN THE MATTER of A. B. &c.

LET Esquire Stipendiary Magistrate appear 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 may be heard TO SHOW CAUSE why an order should not be made granting bail to the above-named A. B. UPON THE GROUND that there is no reason to fear that the said A. B. will not appear if bail is granted AND UPON THE FURTHER GROUNDS appearing in the affidavit sworn and filed in support hereof.

Dated at this day of 19 .

Registrar.

This summons is issued out by whose address for service is at the office of Messieurs [*Number*] Street .

ORDER GIVING LEAVE TO ISSUE SUMMONS.

(*Same heading.*)

IN CHAMBERS.

day the day of 19 .

UPON READING the motion filed herein and the affidavit filed in support thereof and upon the application of Mr. of Counsel for IT IS ORDERED by the Honourable Mr. Justice that leave be and the same is hereby granted to issue a summons to Esquire Stipendiary Magistrate to show cause why the said A. B. should not be admitted to bail.

Registrar.

ORDER FOR BAIL.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

(*Same heading.*)

day the day of 19 .

UPON READING the summons sealed herein and the affidavits of filed in support thereof (and the affidavit of filed in opposition thereto) AND UPON HEARING Mr. of Counsel for the above-named A. B. and Mr. of Counsel for His Majesty the King IT IS ORDERED by the Honourable Mr. Justice that upon the above-named A. B. giving security by his own recognizance in the sum of pounds (£) with two sufficient sureties in the sum of pounds (£) each or four sufficient sureties of pounds (£) each before one of His Majesty's Justices of the Peace for the personal appearance of the said at the next Criminal Session of the Supreme Court to be holden in then and there to answer to all such matters and things as on His Majesty's behalf shall be objected against him he the said be discharged out of the custody of the Gaoler of His Majesty's Prison at as to his commitment for trial on charges of being unlawfully in possession of forged bank-notes.

Registrar.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

BASTARDY.

Presumption of Legitimacy—Separation Deed—Evidence of Non-access—Admissibility.

Where parties are living apart under a separation agreement, evidence of non-access may be given, although the agreement was not by deed.

ETTENFIELD *v.* ETTENFIELD, **[1939] 2 All E.R. 743. P.D.A.D.**

As to rule in *Russell v. Russell*, see HALSBURY, Hailsham edn., vol. 2, pp. 562, 563, par. 772; and for cases: see DIGEST, vol. 3, pp. 364–368, Nos. 54–97.

CONTRACT.

Necessity for Writing—Contract not to be Performed Within a Year—Contract to Procure Employment at Yearly Salary—Statute of Frauds, 1677 (c. 3), s. 4.

An offer by those about to form a company that they would employ a servant at so much per annum is not one to which the Statute of Frauds, s. 4, applies.

VERNON *v.* FINDLAY, **[1939] 2 All E.R. 716. C.A.**

As to contracts not to be performed within a year: see HALSBURY, Hailsham edn., vol. 7, p. 110, par. 156; and for cases: see DIGEST, vol. 12, pp. 123–125, Nos. 806–828.

DISCOVERY.

Interrogatories—Defendants' Employee Previously Witness at Inquest—Defendants Asked to Admit Statements Made by Their Employee at Inquest—Employee Not an Agent to Make Admissions.

Interrogatories will not be allowed as to admissions made at an inquest by the defendant's employee unless it can be shown that he was authorized by his employer to make such admissions.

BURR *v.* WARE RURAL DISTRICT COUNCIL, **[1939] 2 All E.R. 688. C.A.**

As to interrogatories in cases of negligence, see HALSBURY, Hailsham edn., vol. 10, pp. 421, 422, par. 516; and for cases: see DIGEST, vol. 18, pp. 212, 213, Nos. 1599–1610.

EASEMENTS.

Support—Interference—Demolition of Adjoining House—Demolition in Obedience to Clearance Order—Liability of Person Demolishing.

If premises are demolished under a clearance order to which no sanction or penalty is attached, the person demolishing must have the same regard to rights of support as if the demolition were voluntary.

BOND *v.* NORMAN, BOND *v.* NOTTINGHAM CORPORATION, [**1939**] **2 All E.R. 610. Ch.D.**

As to interference with easement of support: see HALSBURY, Hailsham edn., vol. 11, pp. 368, 369, pars. 647, 648; and for cases: see DIGEST, vol. 19, pp. 173, 174, Nos. 1230–1233.

ESTATE DUTY.

"Free of Duty"—Foreign Duty.

A legacy bequeathed "free of duty" to a foreign subject does not throw on the estate the burden of foreign duties.

Re NORBURY; NORBURY *v.* FAHLAND, [**1939**] **2 All E.R. 625. Ch.D.**

As to foreign duties: see HALSBURY, Hailsham edn., vol. 13, pp. 299–301, par. 312; and for cases: see DIGEST, vol. 21, p. 130, Nos. 955–959.

EVIDENCE.

Admissibility—Documentary Evidence—Written Statement made at Police Station Immediately After an Accident—"Proceedings Anticipated"—Evidence Act, 1938 (c. 28), s. 1 (3).

A written statement made immediately after an accident by a person involved who has received the usual caution is inadmissible in evidence under s. 1 (3) of the Evidence Act, 1938, because at the time when the statement was made proceedings must have been anticipated.

ROBINSON *v.* STERN, [**1939**] **2 All E.R. 683. C.A.**

As to necessity for declaration to be *ante litem motam*, see HALSBURY, Hailsham edn., vol. 13, pp. 592, 593, par. 659; and for cases: see DIGEST, vol. 22, pp. 121–123, Nos. 965–982.

Magistrates' Court Decisions.

Recent Cases.

DEFAMATION.

Slander—Privilege—Meeting of Transport Licensing Authority—Words spoken during Proceedings—Whether Privileged Occasion—Practice—Statement of Claim—No Allegation that Words spoken of Plaintiff in the way of his Profession, Trade, or Business—Sufficiency of necessary Implication—Damages.—KENDALL *v.* MATHEWS, **M.C.D. 172** (Paterson, S.M.).

LOCAL AUTHORITIES.

Municipal Corporations—Limitation of Time for Commencement of Action—"Continuance of damage"—Borough Officer also Poundkeeper—Negligent Act in Performance of Authorized Work as Poundkeeper—Whether entitled to Statutory Protection—Municipal Corporations Act, 1931, s. 361.—C. AND H. FANNIN *v.* GREEN, **M.C.D. 157** (Miller, S.M.).

MEETINGS.

Chairman's Status and Duty—General Meeting of Corporate Body—Chairman's erroneous Ruling—Refusal of acceptance of Nomination of Member for Election as Delegate—No Right of Action by such Member against Corporate Body—Chairman's Personal Liability discussed.—CLARKE *v.* WELLINGTON DISTRICT HOTEL AND CLUB EMPLOYEES' INDUSTRIAL UNION OF WORKERS, **M.C.D. 166** (Luxford, S.M.).

MORTGAGORS AND TENANTS RELIEF.

Instrument by Way of Security over Stock and Chattels—Advance partly repaid—Stock dead and Chattels ceased to exist—Whether Grantor a "Guarantor"—Mortgagors and Lessees Rehabilitation Act, 1936, s. 4.—STATE ADVANCES SUPERINTENDENT *v.* HOVEY, **M.C.D. 160** (Paterson, S.M.).

NEGLIGENCE.

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