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THE STATUTE OF WESTMINSTER AND PRIVY COUNCIL APPEALS.

AS long ago as the Legal Conference held in Auckland in 1931, the late Sir Francis Bell raised the question whether the Legislature of a Dominion, which has adopted the Statute of Westminster, can abolish the right of ultimate appeal from the Courts of that Dominion to the Judicial Committee of the Privy Council, founded as it is on an inherent prerogative right of the Crown to exercise appellate jurisdiction.

As we know, the New Zealand Legislature has not adopted ss. 2, 3, 4, 5, and 6 of the Statute of Westminster as part of the law of this Dominion ; so that, in terms of s. 10, those sections remain inoperative here.

However, the day may come when the New Zealand Legislature may be giving consideration to the full adoption of the Statute, as the Dominion of Canada, and the Commonwealth of Australia, and the Union of South Africa, have all adopted it. For that reason, a recent decision of the Judicial Committee itself as to the power of a Dominion Legislature to abolish the right of appeal from its Courts to the Privy Council is of great constitutional importance. Moreover, it serves as a warning to us to take into account all the implications that will follow the adoption of the Statute, including its giving the power to abolish the right of the subject to appeal to His Majesty in Council as the final Court of appeal in litigation commenced in our Courts.

The recent decision of the Judicial Committee was given in a Canadian appeal which has awaited the ending of hostilities for bringing on before the Privy Council, *Attorney-General of Ontario and Others* v. *Attorney-General of Canada* (*Attorney-General of Quebec intervening*), [1947] 1 All E.R. 137.

In New Zealand now—as in Canada before its adoption of the Statute of Westminster—the exercise of the Royal prerogative of appellate jurisdiction is regulated generally, to quote their Lordships in the recent case, by the Judicial Committee Acts of the Imperial Parliament and by Orders in Council, which declare whether an appeal may lie as of right or with the leave of the local superior Court, or there can be an appeal by special leave of the Sovereign on the advice of the Judicial Committee, in which last-mentioned case, their Lordships say, the appeal is sometimes said to be under the prerogative, a description which, if it is intended to be exclusive, is inaccurate.

By the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), which is set out in *1 Public Acts of New Zealand (Reprint), 1908–1931*, p. 1003, and is, of course, in force in New Zealand, any colonial law which is repugnant to the provisions of an Act extending to the colony either by express words or necessary intendment is void and inoperative to the extent of such repugnancy. It followed that a Dominion (or a Province of a federal Dominion) could not validly legislate, before the passing of the Statute of Westminster and its adoption by that Dominion, to abolish a right of appeal to the Sovereign which was provided by Imperial statutes. In the second place, the doctrine which imposed a territorial limitation on the powers of colonial Legislatures might be regarded as a fetter on the legislative competence of a Dominion to deal with the so-called " prerogative " right of appeal.

Much of their Lordships' opinion relates to the effect of s. 101 of the British North America Act, 1867 (Imp.), which provides that the Parliament of Canada may, notwithstanding anything in that statute, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Court for the better administration of the laws of Canada. Under the authority so conferred, the Canadian Parliament, in 1875, passed the Supreme Court of Canada Act, which established a Supreme Court of Appeal, which, by s. 35, was to have, hold, and exercise an appellate civil and criminal jurisdiction throughout Canada.

The British North America Act, 1867, need not concern us, because the New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), is silent as to the establishment of Courts of Justice. By s. 53, it confers on the New Zealand Legislature the power " to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England." Under that power, our Court of Appeal is constituted by statute ; by reason of that limitation, the Judicial Committee Acts, 1833 and 1844, of the Imperial Parliament (whereby the Sovereign is empowered to refer appeals brought before him to the Judicial Committee of his Privy Council), and the Orders in Council made thereunder, regulate the exercise of the Royal prerogative of appellate jurisdiction ; and these statutes and Orders in Council form part

of the law of New Zealand. Consequently, it is the general principle dealt with by their Lordships' Board in the recent case that concerns us; and no local legislation of ours is in point.

After referring in detail to the provisions of the Statute of Westminster, "this Act of transcendent constitutional importance" (as they termed it), their Lordships said that the question for consideration was whether it was competent for the Parliament of Canada to enact not only that the Supreme Court of the Dominion (the appellate Court of the Dominion as a whole) should have civil and criminal jurisdiction within and for Canada, but also that that jurisdiction should be "exclusive" and "ultimate." In other words, their Lordships' task was to determine whether the Statute of Westminster, when adopted by a Dominion, removed all fetters, and enabled the Dominion's Legislature to abolish the right of appeal to the Sovereign in Council.

The Canadian legislative provision under notice was Bill No. 9, entitled "An Act to amend the Supreme Court Act," which was introduced into and received its first reading in the Dominion's House of Commons on June 23, 1939, and on April 14 of the same year the debate was adjourned so that steps might be taken to obtain a judicial determination of the legislative competence of the Parliament of Canada to enact the provisions of the Bill in whole or in part.

The contents of the Bill, "a short but pregnant one," as their Lordships termed it, are as follows:

54. (1) The Supreme Court Act, c. 35 of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:

(1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

(2) Notwithstanding any Royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of Parliament of Canada or any Act of the Legislature of any province of Canada or any other statute of law, no appeal shall lie or be brought from any Court now or hereafter established within Canada to any Court of Appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

(3) The Judicial Committee Act, 1833, and the Judicial Committee Act, 1844, chapter sixty-nine of the statutes, of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.

(2) Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

(3) This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette*.

The Supreme Court of Canada held that the Parliament of Canada is competent to enact the Bill in its entirety. There were two dissentients, one finding that the Bill was wholly *ultra vires* the Canadian Parliament, and the other qualifying his dissent as to an amendment of the Bill to render it *intra vires*. From this decision, the present appeal was brought. It was dismissed.

We do not propose to traverse the reasoning of their Lordships' Board, as the limitations of space in this issue will not permit. It will suffice to state their conclusion.

"It is not consistent," they say, "with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a supreme Court of appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *Coal Corporation* case [[1935] A.C. 500, decided by the Privy Council after the adoption by Canada of the Statute of Westminster], a 'prime element in Canadian sovereignty,' which would be impaired if, at the will of its citizens, recourse could be had to a tribunal in the constitution of which it had no voice." They added, with a reference to the British North America Act, which is irrelevant for our purpose, that it would be alien to the spirit with which the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion Legislature. It is, they say later on, a prime element in the self-government of the Dominion that it should be able to secure in its own Courts of Justice that the law should be one and the same for all its citizens. Their Lordships, in conclusion, applied the words of Lord Macmillan in delivering the opinion of the Board in *Croft* v. *Dunphy*, [1933] A.C. 156, 163: "Their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State."

The effect of this decision, so far as New Zealand is concerned, amounts to this: At present, as we have not adopted the Statute of Westminster, our Legislature is not competent to tamper with the right of appeal to His Majesty in Council; but, if we adopt the Statute, the way would be open for the destruction of this valued right of final appeal.

SUMMARY OF RECENT JUDGMENTS.

THE KING v. CALANDAR.

COURT OF APPEAL. Wellington. 1946. October 16; December 12. BLAIR, J.; KENNEDY, J.; CALLAN, J.

Criminal Law—Appeal from Conviction—Fresh Evidence—Appellant not giving Evidence at Trial—Character of Fresh Evidence—New Trial—Limitation upon Appellant's Evidence—Criminal Appeal Act, 1945, ss. 3, 4.

Where a prisoner, asking for leave to appeal against a conviction and for leave to call witnesses on the hearing of such appeal, tenders new evidence on affidavit in support of his appeal, the Court of Appeal has to examine the probative value of the fresh evidence.

It cannot be said that a miscarriage of justice has occurred, unless the fresh evidence has cogency and plausibility as well as relevance. It must be of such a character that, if considered in combination with the evidence already given upon the trial, the result ought, in the minds of reasonable men, to be affected.

Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced; but, in judging of the weight of the fresh testimony, the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.

Craig v. *The King*, (1933) 49 C.L.R. 429, applied.

Where the appellant has not given evidence at the trial, he cannot subsequently be heard upon any issue upon which he might have given evidence at the trial.

R. v. *Mack*, (1908) 1 Cr.App.R. 132, *R.* v. *Rubens*, (1909) 2 Cr.App.R. 163, *R.* v. *Malvisi*, (1909) 2 Cr.App.R. 251, *R.* v. *King*, (1914) 10 Cr.App.R. 44, and *R.* v. *Rose*, (1919) 14 Cr.App.R. 14, applied.

Counsel: *D. Perry*, for the appellant; *Currie*, for the Crown.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the Crown.

ROBERTS v. BOWIE.

COURT OF APPEAL. Wellington. 1946. September 17. O'LEARY, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Workers' Compensation—Accident arising out of and in the course of the employment—Lightning—Accident caused by Lightning—Whether arising "out of the employment"—General Risk as opposed to Locality Risk—Liability to such Special Risk—Question of Fact—Workers' Compensation Act, 1922, s. 3.

In an action for compensation under the Workers' Compensation Act, 1922, in respect of an accident arising from the forces of nature, such as lightning, it is necessary, to enable the injured worker or his dependants to succeed, to prove that the position he was in in the course of his employment subjected him to more than an ordinary risk of being injured.

Lawrence v. *George Matthews (1924), Ltd.*, [1929] 1 K.B. 1; 21 B.W.C.C. 345, and *Brooker* v. *Thomas Borthwick and Sons (Australasia), Ltd.*, [1933] N.Z.L.R. 1118, applied.

The question whether the position in which the deceased was, in the course of his employment, subjected him to more than an ordinary risk of injury, is one of fact.

In an action under the Workers' Compensation Act, 1922, for compensation in respect of the death of a shepherd who was killed by lightning, brought by his widow, the learned Judge of the Compensation Court found on the evidence: (*a*) that the death of the deceased did not result from a locality risk; (*b*) that it was the result of the fortuitous circumstance that the cloud carrying the lightning came within contact distance of the deceased without coming within contact distance of the higher and more likely contact points in the immediate vicinity; (*c*) that the deceased was riding his horse at the time, and the fact that his head was about 8 ft or 10 ft. above the ground was a probable factor in causing his death by providing a striking-point for the lightning; and (*d*) that the deceased was so riding his horse in the course of his employment.

The Judge stated a case for the opinion of the Court of Appeal on the following question: "Did the deceased die by accident arising out of his employment?"

Held, by the Court of Appeal, 1. That the case stated did not provide an answer to the question of fact that arose.

2. That, if the Judge of the Compensation Court finds that the position in which deceased was at the time of his death subjected him to more than an ordinary risk of being injured, then he died by accident arising out of, as well as in the course of, his employment; and the plaintiff would be entitled to succeed; but, unless the Judge finds that the position in which deceased was at the time of his death subjected him to more than an ordinary risk of being injured, then the defendant would be entitled to succeed.

Counsel: *E. J. Anderson*, for the plaintiff; *A. N. Haggit*, for the defendant.

Solicitors: *Webb, Allan, Walker, and Anderson*, Dunedin, for the plaintiff; *Ramsay, Haggitt, and Robertson*, Dunedin, for the defendant.

ROBERTS v. BOWIE (No. 2).

COMPENSATION COURT. Dunedin. 1946. September 21; October 15. 1947. February 12. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the course of the employment—Lightning—Accident caused by Lightning—Whether arising "out of" the employment—General Risk and Locality Risk—Facts required to prove Liability to Special Risk—Workers' Compensation Act, 1922, s. 3.

Subsequently to the opinion expressed by the Court of Appeal, as above, the hearing of the claim for compensation was resumed. After hearing argument based on the evidence previously given in this Court,

Held, on the facts, That the evidence showed that there was not more than ordinary risk at the actual place where the deceased met his death; that the fact that the deceased was riding a horse did not make it more than an ordinary risk, as the horse plus the deceased did not constitute the highest point in the vicinity; and that the position in which he was at the time of his death did not subject him to more than ordinary risk of being injured.

Andrew v. *Failsworth Industrial Society, Ltd.*, [1904] 2 K.B. 32; 6 W.C.C. 11, *Cosgrove* v. *Cosgrover's Executor*, (1937) 11 W.C.R. 365, and *Voigt* v. *Gross*, (1935) 41 A.L.R. (C.N.) 512, distinguished.

Counsel: *E. J. Anderson*, for the plaintiff; *A. N. Haggitt*, for the defendant.

Solicitors: *Webb, Allan, Walker, and Anderson*, Dunedin, for the plaintiff; *Ramsay, Haggitt, and Robertson*, Dunedin, for the defendant.

MARLBOROUGH HOSPITAL BOARD v. BLENHEIM BOROUGH AND OTHERS.

SUPREME COURT. Nelson. 1947. March 4, 7. FLEMING, J.

Hospitals and Charitable Institutions—"Hospital"—Whether the Institution or merely Building that Houses it—"Maintenance"—Liability of Hospital Board to Rebuild and Maintain in Perpetuity or when Existing Building ceases to be fit for Hospital Purposes—Hospitals and Charitable Institutions Act, 1926, s. 77 (1)—Hospitals and Charitable Institutions Amendment Act, 1929, s. 2 (2) (a).

Section 2 (2) (*a*) of the Hospitals and Charitable Institutions Amendment Act, 1929, is as follows:

"The Marlborough Hospital Board shall keep open for the treatment as heretofore of in-patients and out-patients the existing hospital at Picton, and shall at all times efficiently maintain the same to the satisfaction of the Director-General."

The words "the existing hospital at Picton" refer to the institution and not merely to the building that houses it.

The Marlborough Hospital Board is bound under the provisions of the section to rebuild a hospital at Picton when the existing building ceases to be fit for hospital purposes, provided that it can obtain the necessary consents and approvals required under the Hospitals and Charitable Institutions Act, 1926; and in that event, it is bound to erect a hospital of equal capacity to the present hospital and to maintain such a hospital in Picton in perpetuity, unless relieved by special legislation.

Manchester Corporation v. *Audenshaw Urban Council and Denton Urban Council*, [1928] Ch. 763, applied.

Counsel: *Nathan*, for the plaintiff; *McNab*, for the defendants, Blenheim Borough and Marlborough County; *Horton*, for Picton Borough; *Scantlebury*, for Awatere County and Keneperu Road Board; *Churchward*, for the Valuer-General.

Solicitors: *A. C. Nathan*, Blenheim, for the plaintiff; *A. A. McNab*, Blenheim, for Blenheim Borough and Marlborough County; *Burden, Churchward, and Horton*, Blenheim, for the Picton Borough; *Scantlebury and Noble-Adams*, Blenheim, for the Awatere County and Keneperu Road Board; *Burden, Churchward, and Horton*, Blenheim, for the Valuer-General.

L. DANIELS, LIMITED, AND OTHERS v. W. M. ANGUS, LIMITED.

SUPREME COURT. Wellington. 1946. September 2, 3, 4, 9; December 19. CORNISH, J.

Partnership—Interest on Moneys retained—Partner retaining Balance due to Partnership on Mistaken Idea as to Basis of Calculation of Shares of other Partners—Whether Liable to Pay Interest on the Amounts found Due to them.

A partner, who receives on behalf of himself and his co-partner payment of the balance of the moneys due to the partnership, and retains it under a mistaken idea as to the basis on which the shares of the partners were to be decided, is liable to pay interest on the amounts found due to them as from the date of such receipt. In the present case, such interest was fixed at 4 per cent.

The case is reported on this point only.

Pearse v. *Green*, (1819) 1 Jac. & W. 135; 37 E.R. 327, applied.

Counsel: *A. J. Mazengarb*, for the plaintiffs; *D. Perry*, for the defendant.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiffs; *Perry, Perry, and Pope*, Wellington, for the defendant.

(*Concluded on p. 155.*)

RETIREMENT OF MR. JUSTICE JOHNSTON.

The Bar's Appreciation and Regret.

On April 17, the eve of the retirement of Mr. Justice Johnston on reaching the statutory age-limit, there was a very large and representative gathering of members of the profession at the Supreme Court, Wellington, to bid him farewell in his judicial capacity.

Among those present were Chief Judge Morison, of the Native Land Court, Mr. J. L. Stout, S.M., and Mr. B. L. Dallard, Under-Secretary for Justice.

The Government's Appreciation.

The Attorney-General, the Hon. H. G. R. Mason, K.C., was the first speaker. He said :

" As Attorney-General, it is my privilege to speak on behalf of the Government on this the occasion of your Honour's retirement as a Judge of the Supreme Court of New Zealand. I desire also to associate myself with the Bar in paying tribute, expressing appreciation, and in extending good wishes to your Honour this morning.

" To-day you are taking your farewell after thirteen years of faithful and distinguished public service on the Bench, and in this regard you have carried on the worthy tradition of your illustrious forebears—to mention but two, your father, the Hon. Sir Charles Johnston, and grandfather, Dr. Isaac Earl Featherston—whose records of public service stand out pre-eminent among a noble band of pioneers to whom we in this fair land owe so much.

" It has been truly said that in addition to a good knowledge of the law, a knowledge of the world and of human nature is an equally essential attribute for the making of a good Judge. On your Honour's appointment to the Bench on January 18, 1934, you brought not only the fruits of a liberal colonial education, but you also had the advantage of qualifying in the Homeland and of sitting at the feet of men of eminence in the law, men whose names stand out as giants among the jurists of England, such as Anson and Birkenhead.

The Court of Review.

" The Bench, the Bar and the country have not only been well served because of your culture and your legal erudition, but you have been able to bring to bear a practical sagacity on many problems that arise in a country dependent on primary industry like New Zealand, because of the fact that you are also a practical farmer. The public advantage ensuing from this fact was amply manifested by your able, practical, sympathetic, yet essentially judicial handling of matters before the Court of Review. The herculean nature of the task achieved by this Court under your Honour's wise guidance may be gauged by the fact that it has been estimated that, if the forms used in the presentation of matters before the Court were stacked in a single pile, it would far overtop the height of Mt. Victoria.

" The disposal of such a stupendous amount of disputatious matter with expedition, harmony, and general satisfaction was due, if I may respectfully be permitted to say so, to your Honour's unfailing courtesy and considerateness. The same qualities, coupled with your Honour's profound comprehension of the principles of natural justice and the law, your broad outlook on affairs, and your practical commonsense approach to legal problems, have inspired confidence among both the profession and the public in the general performance of your judicial work.

" Lord Davey once said : ' Not all Judges have the power of divesting themselves of prejudice.' It can be truly said that you have maintained the highest traditions of the Bench, because you have invariably adhered to principles, and have applied them with a human sympathy and breadth of understanding and outlook that knows no pettiness or bias.

" Permit me to say, your Honour, that the country is deeply indebted to you, and on behalf of the Government I desire sincerely to acknowledge that fact, as I do also the fact that recently, because of the needs of the country, you agreed to forgo taking the year's leave to which you were entitled.

" I desire, in association with the members of the Bar, to express the earnest wish that you may be long spared to enjoy a pleasant life in retirement."

The New Zealand Law Society.

The President of the New Zealand Law Society, Mr. P. B. Cooke, K.C., said that the profession throughout New Zealand desired to add its tribute to His Honour's work both at the Bar and on the Bench. He continued :

" During your distinguished career at the Bar, you did not hesitate to devote your gifts and your time to the services of the New Zealand Law Society. In 1938, you were one of the representatives of the Wellington District Law Society on the Council of the New Zealand Society, and from 1929 to 1933 you acted as the representative of the Marlborough District Law Society on that Council. In those capacities, you took, as the records of the New Zealand Society plainly show, a very active and a very helpful part in the conduct of that Society's affairs.

" In your fourteen years of office as one of the King's Judges, you have worthily upheld the great traditions of our Bench—traditions in the building of which one of your illustrious predecessors, who bore the name that you yourself bear, played no small part.

" You have done your duty without fear ; you have searched for the truth with a lamp that was lit by the flame of humanity ; and by your conduct and by your pronouncements you have shown the public and shown the Bar that justice loses nothing when it goes hand in hand with dignity and with courtesy.

" Your Honour, we at the Bar do not wish to let this moment pass without also saying to you that the graceful prose that is to be found in your recorded contributions to the law of our land displays a command of our mother tongue that is the admiration of us all. If your Honour would allow me to take the somewhat unusual course of mentioning a well-known example, I would remind you of the judgment that you delivered in the Court of Appeal in 1935 in *Logan* v. *Waitaki Hospital Board.*

" By your retirement the State will lose the service of a fearless and a wise Judge and the profession will

lose the privilege of daily contact with one whose learning and charm have made the course of business in his Court a delight."

THE WELLINGTON DISTRICT LAW SOCIETY.

Mr. J. R. E. Bennett, President of the Wellington District Law Society, then addressed His Honour.

"The members of the Wellington District Law Society desire to associate themselves with the Attorney-General and the President of the New Zealand Law Society in paying a tribute to your Honour and to the great service your Honour has rendered to this Dominion. Four of our members, Messrs. W. J. Sim, K.C., T. P. Cleary, R. Hardie Boys, and R. E. Tripe, are absent in Hamilton in connection with the hearing of the Election Petition and regret that they are unable to take part in this function this morning.

"After gaining a B.A. degree at Oxford University and being called to the Bar as a member of Lincoln's Inn some fifty years ago, your Honour was shortly afterwards admitted to the Bar in this country.

"Your Honour enjoyed a notable career at the Bar, broken temporarily by a period of service in the London Scottish Regiment in World War I, rewarded by appointment as one of His Majesty's Counsel in 1930, and culminating in your Honour's appointment as one of His Majesty's Judges in 1934. On May 1, 1935, your Honour was appointed Judge of the Court of Review, established under the Rural Mortgages Final Adjustment Act, 1934–35, the Court being subsequently merged in the Court of Review established under the Mortgagors and Lessees Rehabilitation Act, 1936. Upon your Honour's appointment to the Bench, the NEW ZEALAND LAW JOURNAL published an article which included the following words :

> He has a broad outlook on affairs and an extensive knowledge of his fellow-man. Strength of character, independence of mind, and wide human sympathy are among his outstanding characteristics; and his experience and knowledge of the world will commend him to those who appear in Court where, it can confidently be predicted, his considerateness and courtesy will endear him to members of the Bar.

"Your Honour has fulfilled the duties of your high office with great ability, dignity, courtesy, and considerateness, as many of us who have had the privilege of practising in the Court presided over by your Honour can testify. This occasion cannot be allowed to pass without special reference to your Honour's service for a number of years as a member of the Council of our Society, of which your Honour was President in 1928, and as a member of the Rules Committee.

"Now that the time has come for your Honour to retire from the high office which you have so ably administered, we all join in paying you a tribute of esteem and affection, and we wish you many years of health and happiness."

HIS HONOUR'S REPLY.

In reply to the addresses from the Bar, Mr. Justice Johnston said he had listened with great pride to the speeches that had been made by the learned Attorney-General, Mr. Cooke, K.C., and Mr. Bennett. "One would not be human if one were not moved by them," he proceeded. "But I, in a sense, feel at home, because of my liking for the members of the profession to which we all belong, and I can say at once that such use as I have been able to be to the community in general has been entirely due to the assistance that a Judge gets from the Bar. And my liking for the members of the Bar has perhaps enabled me to do my work smoothly and well.

"Some reference was made by the learned Attorney-General to the Court of Review. That was a strenuous four years of work, entailing a lot of trouble, but the remarkable thing about that Court from the beginning—which was a conference held between representatives of the Court, called by the Attorney-General, at which the Attorney-General presided—was the good work of the Commissions, and the extraordinarily good work of the profession itself. Thousands and thousands of budgets were presented, all prepared by solicitors. If I remember rightly, there was a limit upon costs, and there must have been a tremendous amount of work done by the profession for very little remuneration, without which that great deduction that was then made would have been impossible. I have always been surprised, not at the efficiency of the Court itself, but at the efficiency of the solicitors who drew up the orders and assisted the Commissions and Committees and the Court itself. The profession, I think, did great service to the public there.

"I have not made any notes for any speech. I was told that I would be expected to make a speech, but, although I have, I suppose, made a great number, I have generally adopted the rule of saying what is really central in a few words and then toddling along until perhaps the end of dinner, when glasses were filled again. What I wish to say is to thank you all for your kindness to me. I think the supreme test of culture is to be able to thank people gracefully. I cannot rise to that height, but I can thank you sincerely.

"Just before coming in here, Mr. Justice Smith came in to see me, and he said that he remembered a farewell such as this to Mr. Justice Hosking, and all he remembered was that the Judge on that occasion said '*Non omnis moriar*,' which Mr. O'Shea would translate for you as 'I am not completely dead,' but it also means that one will continue to take an interest in the profession. One cannot help taking an interest in the profession.

Early Memories.

"The Attorney-General referred to Sir William Anson, who was my tutor, and some of you have seen his book, *The Law of Contract*, I suppose. I have lost the copy that he presented to me. It is the only book I would have taken away with me if I could have found it. But the outstanding feature of Sir William Anson was his extraordinary kindness. He did not regard the law as a stern mistress, as we are told she is, but rather as a friend, and his extreme kindness to one and all was the outstanding feature of that very learned and extraordinarily clever gentleman. You could dine with him at All Souls, where he would have distinguished guests, and he was always to one and all, both in All Souls and at his place called Pewsey, in Berkshire, the epitome of kindness and hospitality. And it is kindness, I think, that counts so much, and courtesy at the Bar.

"I remember a case Lord Birkenhead asked me to go and listen to in London, where the question was whether a certain alien who had been made a member of the Privy Council should be struck off the rolls. He appeared for the Crown as Attorney-General, assisted by two juniors, and on the Bench there were Sir Rufus Isaacs, the Lord Chief Justice as he then was, and two other Judges. But the outstanding feature that stuck

in my memory was the courtesy between both Bench and Bar, and the intimate manner in which they conducted their proceedings. Of course, most people possibly have regard mostly to Lord Birkenhead's political career, and remember perhaps some of the lurid passages that occurred between him and Magistrates or Judges. I can assure you that, when it came down to serious matters, you found a careful, quiet, very dignified gentleman pressing an argument in a way which could not fail to be attractive, if not convincing. And, indeed, I have found—of course, I go back a long time; I remember hearing Sir George Grey speak; I remember hearing Lord Rosebery speak—I have found that all these people, so far as oratory was concerned, were distinguished by a quietness and a restraint.

"I have found here in New Zealand the same traditions at the Bar as have obtained at Home, and that is why I am so fond of my fellow-members.

Influence of the Professions.

"If you say *Non omnis moriar*, I have no message to give you; I have nothing to advise about; but I would like to say this, if I may: If you look at the Courts of Victorian history, you will find now that people are inquiring as to the features in the people that exerted influence in that period; and, of course, somewhat carelessly, one is apt to make divisions and to say that moneyed interests affected or dominated this period, and the industrial magnates affected or influenced another period. But I think it is acknowledged now that the professional classes, particularly lawyers, had a very great effect on the history of the latter part of the Victorian era. It is, I think, perfectly true that the effect this profession must have on the future will be very profound, or, if it is not profound, then the profession will have failed in its duty.

"When I was at the Bar—or rather reading or eating dinners in London—there were a great number of Indian students. In fact, we were over-run with Indians. You dined in messes of four, with a bottle of wine to four always, and you chose the Indians as a rule, because they did not drink wine. Again, there were many Indians at Balliol, and all of them afterwards reading for the Bar. Well, you all know that the Indian problem is very much to the forefront today, and I am speaking with a very imperfect knowledge; but people who have been there tell me that it is the Hindu lawyer who really rules the Hindus. They exercise great influence over some 400,000,000 people, most of whom are illiterate. Our profession has a great deal to do, or should have a great deal to do, in influencing opinion in New Zealand. They say it is not a profession of which the public have much love, but I think that that is incorrect. I think that no one who moves about can fail to recognize the enormous amount of work that the profession does for nothing, for all sorts of people, and I think people can hardly realize the state of affairs when there were not good lawyers about to whom one could go for advice on an infinity of questions. It would be a void that could not, I think, be filled.

A Lawyers' Club.

"All sorts of questions arise, and, as you know, are arising now affecting the profession, and, in a memorandum from abroad referring to the question of the institution of an Appellate Court, and that class of question, I saw that the writer regretted that there was an hiatus in the profession that should be filled, so that its members could meet more frequently on more intimate terms than they do now, such as is done in England, both by dining together in the Hall, by having lunch together, and so on. Here, apart from one's own particular friends, one has only the Library in which to meet other members of the profession; and that is rather a quiet place to get very far. I notice the medical profession here continually dining together and meeting. If I were practising and I wanted to tell the Attorney-General what I thought of him, I should prefer to do it at lunch, or dinner, as the case might be; and I think there is some need for the profession to have its own club, or at any rate its own dining-rooms, so that the Judges will not have to waste an hour in the middle of the day while having lunch; they would have their lunch with the profession, and then get to work again.

"I think that the profession wants to meet more often—all the members of it—on other occasions than has been the case in the past. I have heard you have had a very successful Conference here, both intellectually and socially, and I am sorry I was unable to take part in it.

"That is all I have got to say. I hope you will excuse me when I leave the Bench from anything further. Cardinal Newman wrote his *Apologia pro Vita Sua* in English, which he deliberately chose to reach the public or the readers who believed in his sincerity. Mr. Cooke, whom I more or less brought up, has always complained of my English, and no doubt he was right. All I wish to say is that, when I say thank you, I say it with all my heart."

* * * * * *

The recently-retired Judge has, for some weeks past, been an inmate of a private hospital in Wellington, where he underwent an operation. Members of the profession will be glad to know that he is progressing satisfactorily. Every one wishes him a speedy return to good health.

OBITUARY.

Mr. A. W. Reeves (Christchurch).

Mr. A. W. Reeves died recently in Christchurch, in his eighty-fourth year. He filled the office of Supreme Court Librarian from the year 1910 until his retirement in 1944. He was also Secretary to the Canterbury District Law Society from the year 1922 to 1944. He was most conscientious and capable in the discharge of his duties, and took particular pride in maintaining the Library in an efficient condition. His son, Mr. E. W. Reeves, is in practice in Christchurch.

MR. G. G. G. WATSON.

His Lengthy and Valuable Service to the Profession.

At the annual meeting of the Council of the New Zealand Law Society, tributes were paid to the long and meritorious service of Mr. G. G. G. Watson to the profession. This year, Mr. Watson had declined nomination as a Wellington representative on the Council, and his loss to the Council and the Standing Committee of the New Zealand Society was the subject of a unanimous resolution of appreciation of his work in the interests of the profession.

The President, Mr. P. B. Cooke, K.C., before the commencement of the Council's formal business, said that he was sure it was the wish of them all, as it was his own wish, that he should refer to the absence from the Council of Mr. Watson. Of Mr. Watson's service to the Society the Vice-President, who served with him for so long, would speak in a moment. But he, as President, desired to say that Mr. Watson's keen and constructive outlook, his broad common sense, his human view of any and every problem that arose, and his zeal in assisting in the performance of the duties of the profession and in the protection of its rights, were all such that they would be a great deal poorer without his presence at their deliberations.

The Vice-President, Mr. A. H. Johnstone, K.C., said the Council seemed extraordinarily incomplete without the presence of Mr. Watson. For several years he was a member of the Council as a proxy for Societies outside of Wellington, but for the last fifteen years he had represented the Wellington Society on the Council. To the deliberations of the Council over the long years of his service he always made sound and wise contributions and, if he had done nothing more, we would have considered him one of its most distinguished members. But, in addition, he also took time from a very busy practice to serve on the Standing Committee, to attend deputations, and to contribute to all the activities of the Council. In this way for twenty years he had given signal service to his profession.

The following resolution was then carried by acclamation :

> " That this Council has learned with deep regret that Mr. Watson has declined to accept nomination for a further term as a member of this Council and that it expresses its gratitude to him for the signal services which he has tendered to the New Zealand Law Society and to the profession during the long period of his membership."

THE TITLE "HONOURABLE."

Use by Persons with Status of Supreme Court Judge.

At the annual meeting of the Council of the New Zealand Law Society it was reported that the question of the use of the title of " The Honourable " by a person who had been given the status of a Judge of the Supreme Court while not in fact appointed to the Supreme Court, had been considered by the Standing Committee, who submitted the following report :—

> The Standing Committee was directed by the Council of the Society to consider the question of the use of the title of " The Honourable " by a person who has been given the status of a Judge of the Supreme Court while not in fact appointed to the Supreme Court.
>
> The Standing Committee has considered the matter and reports as follows :—
>
> (1) Save in exceptional cases to which it is unnecessary to refer, titles of honour cannot be acquired except by grant from the Crown or by statute. Moreover, such a title conferred by a statute of the New Zealand Parliament, could not be validly used in any other part of the British Empire.
>
> (2) By a despatch dated December 22, 1911, His Excellency the Governor was informed that—
>
> " The King has been pleased to approve of the use and recognition throughout His Majesty's Dominions of the title of ' Honourable ' in the case of the Chief Justice and Judges of the Supreme Court of New Zealand."
>
> (3) The notice in the London *Gazette* (a copy of which was enclosed in that despatch) (see 1912 *New Zealand Gazette*, 727) shows that a similar recognition of the title would be accorded in the case of retired Chief Justices and Judges of the Supreme Court who might then have been or who might thereafter be *permitted* to bear it after retirement.
>
> (4) The Standing Committee is satisfied that there is no grant from the Crown and no Imperial Statute in force in New Zealand that confers the right to use the title " The Honourable " on any person appointed as Judge of the Arbitration Court under ss. 63, 64 (1) and 64 (2) of the Industrial Conciliation and Arbitration Act, 1925, or appointed as an additional Judge of that Court under subs. 1A of s. 2 of the Industrial Conciliation and Arbitration Amendment Act (No. 2), 1937, or appointed as Judge of the Compensation Court under Reg. 3 of the Compensation Court Regulations, 1940, or appointed temporarily as Judge of that Court under Reg. 3A of those Regulations, or appointed as Judge of the Land Sales Court under ss. 4, 5 (1), and 5 (2) of the Servicemen's Settlement and Land Sales Act, 1943, or appointed as Chairman of the Local Government Commission under ss. 3, 4 (1), and 4 (2) of the Local Government Commission Act, 1946.
>
> (5) The Standing Committee is also satisfied that there is no statute of the New Zealand Parliament that confers the right to use the title " The Honourable " on any of the persons referred to in the preceding paragraph.
>
> In expressing that view the Standing Committee is not unmindful of the fact that by the provisions referred to in that paragraph (except those relating to the temporary appointment of a Judge of the Compensation Court) such persons are as to tenure of office, salary, emoluments, and privileges to have the same rights and to be subject to the same provisions as a Judge of the Supreme Court. The Standing Committee, is, however, of opinion that the word " privileges " does not include titles of honour.
>
> Nor is the Standing Committee unmindful of the provisions of s. 28 of the Finance Act (No. 2), 1935 (which relates to an individual case), or of the provisions of s. 34 of the Finance Act, 1940 (which also relates to an individual case). The Standing Committee is, however, of opinion that in each of those sets of provisions the expression " The Honourable " is used in a recital and not in a provision that is directed to the conferment of a title, that the use of the expression is in each case a mistake on the part of the Legislature,

and that in each case the mistake should therefore be disregarded.

(6) For the foregoing reasons, the Standing Committee is of opinion that the right to use the title "The Honourable" has not been conferred on any of the persons referred to in para. (4) above.

The following resolutions were passed:

(1) That the report of the Standing Committee be adopted and that the Standing Committee be thanked for its work.

(2) That the Council draws attention to the fact that those who have been given by statute the status of a Judge of the Supreme Court, while not in fact appointed to the Supreme Court, are not entitled to the title of "The Honourable."

(3) That a copy of the resolution and a copy of the report of the Standing Committee be sent to the Attorney-General.

LAND AND INCOME TAX PRACTICE.

National Security Tax Abolition Emergency Regulations.—In accordance with the above regulations, national security tax at the rate of 6d. in the £ will not be payable on any salary or wages, or income from which tax is deductible at the source in the same manner as for salary and wages, derived in respect of any period *after April 20, 1947*. Income other than salary or wages, which is liable to assessment of social security charge in respect of the income year ended *March 31, 1947*, will be chargeable at the rate of 1s. 6d. in the £, or, more precisely, at 1d. in every 13¼d. or part thereof.

The reason for the abolition of national security tax being operative from different dates, according to whether the income be wages or "other" income, is to ensure that both classes of taxpayers are liable to national security tax for the same income period. Wage-earners will have paid national security tax on income from July 22, 1940, to April 20, 1947, a period of 2,465 days. Those who pay on income other than salary or wages will have paid on the basis of income from July 1, 1939, to March 31, 1946, a period of 2,466 days.

A table showing the method for computation of the new rate of social security charge is endorsed on the declaration form for use in regard to the income year ended March 31, 1947.

The Tax Department has arranged for the printing of an explanatory sheet for the benefit of employers and others who are liable to deduct the charge at the source. For the first time the rate is not one which lends itself to mental calculation of the charge payable on any amount of income, and the printed tables, which will be distributed through the various employers' associations, will be very useful.

An apportionment of wages tax is necessary where two weeks' holiday pay is received by a worker who has continued his employment for twelve months. In this case, as with all ordinary paid holidays, the wages tax is chargeable at the rate ruling during the period the holiday is taken, an apportionment being made if it should fall within a period when a change in rate occurs—*e.g.*, April 10 to April 23, 1947, inclusive, eleven days at 2s. and three days at 1s. 6d. in the £.

It is understood from references in the Press that the regulations will be confirmed by an appropriate provision in a Finance Bill during the next session of Parliament.

Visitors to New Zealand earning Wages.—A person may be present in New Zealand, but may not be "ordinarily resident in New Zealand for the time being" within the meaning of s. 110 (1) of the Social Security Act, 1938. Where such a person does not intend to stay in the country for more than twelve months, and earns salary or wages during that period, application should be made to the Superintendent of the local branch of the Department for a certificate of exemption from social security charge. It is understood that superintendents may authorize a certificate of exemption which can be produced to employers, who are in turn authorized not to deduct social security charge from salary or wages for a specified period not exceeding six months. Applications for extensions of that period may be made, and every case would be treated on its merits. This procedure saves the trouble on the part of the person concerned, and his employers, in obtaining and supplying certificates of earnings and the tax deducted, in the event of an application for a refund being made prior to departure from New Zealand.

Annuity Payments charged on land: Not a Deductible Item.—Cases arise where property is left to beneficiaries subject to an annuity being payable to a certain person—*e.g.*, a farm may be left to sons conditional on the sons paying an annuity to the testator's widow during her lifetime.

The Tax Department formerly considered that in such a case the payment made by way of annuity was a deductible item in arriving at the assessable income of the beneficiary, but, following on the decision in *T.* v. *Commissioner of Taxes*, (1943) 3 M.C.D. 101, the Commissioner now holds that the annuity payments made in any particular year are payments made in acquisition of the property, and are not expenses exclusively incurred in producing the assessable income of the taxpayer in that year. This interpretation of the case mentioned has not, however, been accepted without question, and, on enquiry from the Commissioner, it is understood that a case is being stated in order that the Court may determine the matter.

Pending any new ruling which may be given, the Commissioner holds that the position is the same whether property is acquired by way of devise, or gift, or purchase, subject to an annuity payment. With regard to the deductibility of annuities generally, the Commissioner is now holding that annuities are not deductible in the following cases:—

(*a*) Where property is devised or bequeathed subject to the payment of an annuity or subject to an annuity charged on such property or on the income of such property.

(*b*) Where property is transferred by way of gift to a person upon condition that such person shall pay an annuity to the transferor.

(*c*) Where property is sold in consideration of the payment of an annuity.

(*d*) Where property which is subject to an annuity charge is purchased or otherwise acquired (*e.g.*, by a mortgagee entering into possession) and is claimed as a deduction by the person acquiring the property.

If any alteration arises through a new ruling of the Court, this JOURNAL will endeavour to give publicity to this matter, which is of considerable interest to legal practitioners who have arranged wills providing for annuity payments charged on property which will produce income.

Examples of a Charitable Bequest.—Income held in trust for charitable purposes within the meaning of s. 78 (*jj*) of the Land and Income Tax Act, 1923 (as amended by s. 4 of the Land and Income Tax Amendment Act, 1944), is exempt from tax. Although all bequests or gifts for public purposes are not charitable, it has been held that gifts for the provision of a library, a museum, a reading-room, a botanical garden, and an observatory for the public benefit are charitable. A legacy to provide funds for the ultimate erection of a town-clock is of the same category, and the income from the temporary investment of the funds would be exempt from tax on the grounds that it is income from a charitable bequest.

Special Exemption: Housekeeper-daughter. — Where a widowed taxpayer employs a daughter as housekeeper to care for children under eighteen years of age and the housekeeper-daughter is over the age of eighteen years at the beginning of

the income year (always April 1), he is entitled to claim the full exemption of £100 as value of keep if the daughter was fully employed in the home for the whole year, even although no monetary fixed wage was paid. If the daughter were under eighteen years of age, the maximum exemption is £50, allowed under the heading of a dependent relative.

Special Exemption: Wife and Housekeeper.—Where a widowed taxpayer employs a housekeeper (as defined in the Land and Income Tax Act) and remarries during the income year, he is entitled to claim for *both* the housekeeper exemption calculated to the date of remarriage *and* the wife exemption of £100 (as for a full year, with no apportionment), subject to the usual provisions on account of the wife's income and the £26 rebate limit. The same ruling applies where a taxpayer marries his housekeeper during the income year.

Special Exemption: Dependent Relatives; Payment to Divorced Wife.—The amount paid by a divorced husband to his former wife in pursuance of a Court order is maintenance paid for the support of the divorced wife, and is "necessary" for the purposes of s. 7 of the Land and Income Tax Amendment Act, 1945. Thus, in respect of permanent maintenance, the divorced husband can claim the exemption up to the maximum amount allowable, irrespective of the capital or general income position of his former wife.

Allowances: Public Service Superannuation Fund, National Provident Fund.—On the death of a contributor to the Public Service Superannuation Fund, the widow may elect to receive either a refund in a lump sum of the actual amounts contributed by her husband to the Fund, or, in lieu thereof, an annuity of £1 per week for the widow during her lifetime or until remarriage, plus 10s. per week for each child under sixteen years of age. The children's allowances are considered to be the income of the children, and no social security charge is payable for as long as a child is under sixteen years of age. The annuity of £1 per week to the widow is, of course, subject to deduction of social security charge at the source, except in a few cases where annuitants were receiving the widow's allowance prior to 1939 and did not elect to have the social security charge deducted at the time of payment, and who have continued to declare their annuity as income other than salary or wages.

A similar ruling applies with regard to allowances payable from the National Provident Fund—*viz.*, the allowance to a widow is assessable for income tax and social security charge purposes, but amounts paid to a widow on behalf of children are treated as the income of the child or children, and are not subject to payment of social security charge.

Cashiers' Allowances.—The practice of the Department is not to regard cashiers', tellers' or other like risk allowances as being emoluments for the employment or service of the recipient, and the allowances are not assessable for income tax or social security charge.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The Annual Meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on March 14, 1947.

The following Societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., V. N. Hubble, and L. P. Leary; Canterbury, Messrs. L. D. Cotterill and W. R. Lascelles; Gisborne, Mr. J. G. Nolan; Hamilton, Mr. W. C. Tanner; Hawke's Bay, Mr. W. G. Wood; Marlborough, Mr. W. Churchward; Nelson, Mr. V. R. Fletcher; Otago, Mr. F. J. D. Rolfe; Southland, Mr. K. G. Roy; Taranaki, Mr. H. S. T. Weston; Wanganui, Mr. R. S. Withers; Westland, Mr. J. W. Hannan; and Wellington, Messrs. P. B. Cooke, K.C., J. R. E. Bennett, G. C. Phillips, and W. P. Shorland.

Mr. A. T. Young (Treasurer) was also present.

An apology for absence was received from Mr. J. B. Johnston (Auckland).

The President, Mr. P. B. Cooke, K.C., occupied the Chair and welcomed all new members attending for the first time.

Mr. G. G. G. Watson's Retirement.—A resolution, carried by acclamation, expressing appreciation of Mr. Watson's lengthy service to the Society, and the supporting speeches, appear elsewhere in this issue.

Election of Officers.—The following officers, the only nominees for the positions, were elected: *President*: Mr. P. B. Cooke, K.C.; *Vice-President*: Mr. A. H. Johnstone, K.C.: *Hon. Treasurer*: Mr. A. T. Young; *Management Committee of Solicitors' Fidelity Guarantee Fund*: Messrs. E. P. Hay, A. H. Johnstone, K.C., D. Perry, and A. T. Young; *Audit Committee*: Messrs. H. E. Anderson and J. R. E. Bennett; *Conveyancing Committee*: Messrs. A. B. Buxton, S. J. Castle, and E. P. Hay; *New Zealand Council of Law Reporting*: Mr. G. T. Baylee was appointed a member of the New Zealand Council of Law Reporting for a further term of office; *Disciplinary Committee*: Messrs. P. B. Cooke, K.C., A. H. Johnstone, K.C., A. N. Haggitt, E. P. Hay, J. D. Hutchison, J. B. Johnston, M. R. Grant, and G. G. G. Watson; *Library Committee*: *Judges' Library*: Messrs. T. P. Cleary and F. C. Spratt.

Solicitors' Audit Regulations, 1938: Transmission of Law Trust Moneys to Solicitors Practising at a Distance from the Court.—The Under-secretary of Justice wrote as follows:—

"Referring to previous correspondence herein, I have to state that the following procedure suggested by this Department has been concurred in by Treasury and Audit—*viz.*, that the solicitor receiving law trust moneys by post from the Clerk of Court will issue a receipt from his trust receipt book, and the Clerk of Court law trust payout receipt form will be endorsed by the solicitor with the number and date of the solicitor's receipt. The two documents sh uld then be returned t the Clerk of Court, who will affix the solicitor's receipt to his payout receipt book. I assume this procedure will be satisfactory to your Society, and upon your advice that this is so and that solicitors are being notified, arrangements will be made for Clerks of Court to be advised of the new procedure.

"The Controller and Auditor-General, whilst raising no objection to the proposed change draws attention to the fact that it does not appears to overcome the difficulty arising out of Reg. 7 (9) of the Solicitors' Audit Regulations, 1938, which requires that a solicitor shall retain the receipt with the carbon duplicate in his book of forms. I cannot, however, follow this, as if the proposed procedure is adopted then para. (*d*) of Reg. 7 (8) would have no application to moneys forwarded by post, as in such cases the Court will not 'require a receipt to be given on its own form of receipt.'

"Regarding the last paragraph of your letter of November 26, I would point out that s. 181 (*j*) of the Stamp Duties Act, 1923, exempts from stamp duty receipts given for payments made from a Clerk of Court's law trust account."

The following report was received from the Joint Audit Committee:—

"The Joint Audit Committee disagrees with the view of the Controller and Auditor-General and concurs in the view of the Under-Secretary of Justice expressed in the latter's letter of January 15, 1947. If the procedure outlined in the letter from the Under-Secretary is adopted reg. 7 (8) (*d*) will have no application to moneys forwarded by post as in such cases the Court will not require a receipt to be given on its own form of receipt. The solicitor is required to endorse the Clerk of Court's law trust payout receipt form with the number and date of the solicitor's receipt and such an endorsement does not, in the opinion of the Committee, constitute a receipt. The Joint Audit Committee recommends that the procedure proposed in the letter of January 15, 1947, from the Under-Secretary of Justice be adopted."

It was decided to adopt the report, and that the Under-Secretary of Justice be informed accordingly and be advised that District Law Societies would be informed of the arrangement.

Native Reserve Leases.—The Registrar of the Native Land Board wrote as follows:—

"In reply to your letter of the 18th instant, the Native Trustee will be satisfied if the certificate under clauses 4

and 5 of the circular of 28/8/1946 is given by the parties to the transaction or is embodied as a covenant in the memorandum of transfer of lease.

"I think it is not unreasonable to ask for this. The only alternative will be for the Native Trustee to arrange an inspection of each property before he gives his consent and this would entail delay and consequent inconvenience to the parties."

The Wellington and Nelson Societies, who had referred this matter to the Council for its consideration, advised that the suggestion made by the Registrar was acceptable. It was resolved accordingly.

Compensation Court Delays.—The Attorney-General wrote as follows:—

"Replying to your letter of 14th instant, the Judge of the Compensation Court has now been freed from other work which was engaging his attention and will be now able to concentrate on this work. It is expected, therefore, that arrears will be shortly overtaken and the work thereafter kept up to date."

The letter was received.

Sale of Digests.—The Director of Rehabilitation wrote as follows:—

"I agree with your proposal to donate a prize to Rehabilitation students in Law out of the proceeds of the sale of the surplus copies of the Digest held by you.

"I note that you intend making an annual prize of £10 to the student gaining the highest marks in the Senior Scholarship in Law, and that this fund will be exhausted in three years."

The Registrar, University of New Zealand, wrote as follows:—

"The Senate, at its recent meeting, discussed your letter of December 20, and your supplementary letter regarding a special prize for ex-servicemen taking the Senior Scholarship subjects Property and Contract.

"The Senate agreed to accept the trust and to administer the prize under the conditions indicated by the Society."

The correspondence was received.

The Use of the Title "The Honourable."—The Council's deliberations on this topic appear elsewhere in this issue.

Shortage of Paper: Regulations.—At the December meeting of the Council the Standing Committee had been asked to ascertain the general position in the various Districts and empowered to take whatever action was considered necessary.

The President stated that, although the replies from District Societies showed that there was, in general, a paper shortage, the Standing Committee felt that, as the replies were not unanimous, the matter was one for the consideration of the Council.

After some discussion, it was decided that no action should be taken.

Enactments by Order in Council.—The resolution of the Wellington Society concerning enactments made by Order in Council was adopted by the Council, and it was resolved to send a copy of it to the Attorney-General and to the Press.

Appointments to the Supreme Court Bench.—A resolution was moved:—

"That no Judge be appointed to the Supreme Court Bench or Court of Appeal who is not at the time of his appointment an actively practising member of the Bar of acknowledged standing."

This was carried, and it was resolved to send a copy of it to the Attorney-General and to the Press.

RULES AND REGULATIONS.

Emergency Regulations Revocation Order, No. 6. (Emergency Regulations Act, 1939.) No. 1947/33.

Overseas Passengers Emergency Regulations, 1939, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1947/34.

Maori Births and Deaths Registration Regulations, 1935, Amendment No. 1. (Births and Deaths Registration Act, 1924.) No. 1947/35.

Wool Disposal Regulations, 1947. (Wool Disposal Act, 1945.) No. 1947/36.

Motor-spirits Prices Regulations, 1942, Amendment No. 7. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1947/37.

Electricity Control Order, 1945, Amendment No. 2. (Supply Emergency Regulations, 1939, and the Electricity Emergency Regulations, 1939.) No. 1947/38.

Quarantine Regulations, 1921, Amendment No. 4. (Health Act, 1920.) No. 1947/39.

Noxious Weeds Act Extension Order, 1947. (Noxious Weeds Act, 1928.) No. 1947/40.

Animals Protection (Mutton Birds) Warrant, 1947. (Animals Protection and Game Act, 1921–22.) No. 1947/41.

Grading of Primary-school Teachers Regulations, 1947. (Education Act, 1914.) No. 1947/42.

New-Zealand-Grown Vegetables Regulations, 1947. (Orchard and Garden Diseases Act, 1928.) No. 1947/43.

Traffic Regulations, 1936 (Reprint). (Motor-vehicles Act, 1924.) No. 1947/44.

Enemy Property Emergency Regulations, 1939, Amendment No. 6. (Emergency Regulations Act, 1939.) No. 1947/45.

Breadmaking Industry Control Order, 1943, Amendment No. 4. (Supply Control Emergency Regulations, 1939.) No. 1947/46.

Customs Export Prohibition Order, 1947. (Customs Act, 1913.) No. 1947/47.

Board of Trade (Sugar Price) Revocation Regulations, 1947. (Board of Trade Act, 1919.) No. 1947/48.

Motor-spirits Prices Regulations, 1942, Amendment No. 8. (Motor-spirits (Regulation of Prices Act), 1933.) No. 1947/49.

Government Railways Classification and Pay Regulations, 1942, Amendment No. 5. (Government Railways Act, 1926.) No. 1947/50.

Tenancy Agreements (End of the War) Order, 1947. (Validation of Wartime Leases Emergency Regulations, 1945). No. 1947/51.

Fish-pass Regulations, 1947. (Fisheries Act, 1908.) No. 1947/52.

Revocation of the Warrant of Fitness Emergency Order, 1944 (No. 2). (Transport Legislation Emergency Regulations, 1940.) No. 1947/53.

Copyright (United States of America) Order, 1946. (Copyright Act, 1913.) No. 1947/54.

Opossum Regulations, 1947. (Animals Protection and Game Act, 1921–22.) No. 1947/55.

Board of Trade (Meat Grading) Regulations, 1943, Amendment No.2. (Board of Trade Act, 1919.) No. 1947/56.

Royal New Zealand Air Force Regulations, 1938. (Air Force Act, 1937.) No. 1947/57.

Drainage and Plumbing Extension Notice, 1947, No. 2. (Health Act, 1920.) No. 1947/58.

Hairdressers (Health) Regulations Extension Notice, 1947, No. 1. (Health Act, 1920.) No. 1947/59.

Nurses and Midwives Regulations, 1947. (Nurses and Midwives Act, 1945.) No. 1947/60.

Cook Islands Legislative Council Regulations, 1947. (Cook Islands Act, 1915.) No. 1947/61.

Samoa Immigration Amendment Order, 1947. (Samoa Act, 1921.) No. 1947/62.

Board of Trade (Onion) Regulations, 1938, Amendment No. 4. (Board of Trade Act, 1919.) No. 1947/63.

Enemy Trading (Germany) Notice (No. 2), 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/64.

Enemy Property (Germany) Notice, 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/65.

Enemy Trading (Japan) Notice, 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/66.

International Air Services Licensing Emergency Regulations, 1947. (Emergency Regulations Act, 1939.) No. 1947/67.

Social Security (Hospital Benefits for Out-patients) Regulations, 1947. (Social Security Act, 1938.) No. 1947/68.

Hospital Board Employees (Conditions of Employment) Regulations, 1947. (Hospitals and Charitable Institutions Act, 1926.) No. 1947/69.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 101.—S. TO A. BROTHERS, LTD.

Urban Land—Potentiality Value—Fair Value between Parties—How ascertained—Servicemen's Settlement and Land Sales Act, 1943, s. 54.

Appeal concerning a property situated in Grey Street, Gisborne, and adjoining the business premises of A. Brothers, Ltd., situated at the corner of Grey Street and Gladstone Road. The property comprised a section of 37.7 perches with a frontage of 54 ft. together with a substantially built wooden building used for many years for religious purposes. It was not disputed that the value of the property, considered without reference to its situation in relation to the adjoining premises of A. Brothers, Ltd., would lie between the sum of £1,500, being the average of two valuations presented by the Crown, and the sum of £1,705, the amount of a valuation presented by Mr. B. on behalf of the vendor.

The land was in fact sold to the owner of the adjoining property, A. Brothers, Ltd., for £2,350.

The Court (per *Archer*, J.) said: "The sole question in issue in this appeal is whether the sale price can be justified by reason of what is termed potential value.

"That a potential value, where a potentiality in fact pertains to the land in question, can properly be included in the value of the land was made clear in *In re a Proposed Sale, Lehmann's Trustees to Beamish*, [1944] N.Z.L.R. 772; Case No. 23: *L. Estate to B.* The Committee deemed itself bound by this decision to have regard to what an average buyer would consider to be the degree of potentiality attaching to the particular property on December 15, 1942, and determined upon the evidence that the valuation of Mr. B., amounting to £1,705, was the maximum amount that an average buyer would have paid for the land at the crucial date and must be deemed, therefore, to include any potential value which it might be said to possess.

"Before this Court, Mr. *Wauchop* contended that the Committee had not appreciated in full the import of the English authorities followed by Finlay, J., in his decision in *Lehmann's Trustees to Beamish* and that upon those authorities as properly applied to the facts of the present case consent might properly have been given to the present transaction at the full sale price. His contention in short was that the references in *In re a Proposed Sale, Lehmann's Trustees to Beamish* to an 'average' buyer should be limited to such circumstances as there obtained, but have no application, or have only a limited application, to a case where as in the present case, the facts more closely resemble the actual facts in *Inland Revenue Commissioners* v. *Clay*, [1914] 1 K.B. 339: aff. on app. [1914] 3 K.B. 466. It is, therefore, necessary to compare the facts of the present case with those in *Lehmann's* case with a view to determining whether the latter case can properly be distinguished.

"*Lehmann's* case related to the sale of a small house property to the owner of an adjoining factory and it was therein contended that the contiguity of the house property to the factory created a potential value. The Court found as a fact that no such potential value existed in December, 1942, and there must at least be doubt as to whether potential value existed at the date of sale. It was laid down that the degree of potentiality at any given date must be determined by a consideration of all the relevant facts. The primary fact upon which the Court must be satisfied before it can hold potential value to have been established, is that the adjoining owner was at the relevant date willing to pay a price in excess of the normal price for the land in question. If this is established it then becomes of importance to ascertain the extent to which the adjoining owner's requirements and intentions might reasonably have been known to the vendor and to other possible purchasers.

"It is evident from a careful reading of *Lehmann's* case that the purchaser, Beamish, had no particular interest in Mrs. Lehmann's property in December, 1942. In April of that year he had purchased another adjoining property and in the words of Finlay, J.: 'If either Mrs. Lehmann or any potential buyer had any such knowledge [*i.e.* of Beamish's business], they would also probably know that, by his purchase of April, 1942, Mr. Beamish had for the time being fully satisfied the demands of the Harris Co. for expanded premises. Those demands, Mr. Beamish testified, were not renewed until after 1942' [1944] N.Z.L.R. 772, 777.

"It is also evident that even at the date of sale the purchaser did not consider the property to be worth to his company the full sale price or even the sum of £900 at which the sale was approved by the Committee. The judgment reads: 'The conclusion is inescapable that £1,025 was an extremely high price for the property now in question even as at the date of sale. The purchaser, Mr. Beamish, who bought to provide extended factory premises for the Harris Co., certainly thought so, for, in the course of his evidence, when he was called by the appellant, he said that his estimate of the value of the property before the sale was £775. He explains his agreement to pay a higher price by saying that he relied upon the Committee to reduce the price to a proper figure' *Ibid.*, 773.

"It therefore seems to be clear that at the time of the sale from *Lehmann's Trustees to Beamish*, the purchaser, notwithstanding his desire to extend his factory premises, did not consider the property worth more to him than, in the Committee's view, it was worth to an average buyer in the open market and this was even more clearly the case in December, 1942. Put in another way, the purchaser made no claim that the adjoining property had any special value to his firm and no other prospective purchaser with a knowledge of the relevant facts could reasonably have concluded either in December, 1942, or at the date of sale that the property had any special value to the Harris Company, or in other words that it possessed any potential value.

"In *In re a Proposed Sale, Lehmann's Trustees to Beamish*, it was held by Finlay, J., that the observations concerning the valuation of land and the assessment of potential value in *Inland Revenue Commissioners* v. *Clay*, above referred to, and in *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam*, [1939] A.C. 302; [1939] 2 All E.R. 317, are applicable to proceedings under the Servicemen's Settlement and Land Sales Act, 1943. This is of course relevant in that the basis of valuation under any particular statute must be determined by reference to the Act in question and the English authorities were decided under particular statutes which are therein referred to. In *Clay's* case the relevant statute provided that the gross value of land meant the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition free from any encumbrances, might be expected to realize. In the Indian case the relevant statute provided that it was the market value of the land which had to be ascertained. The Court as at present constituted is in agreement with Finlay, J., that in both of the authorities quoted the object to be attained by valuation was substantially the same as is involved in ascertaining the basic value of land under the Land Sales Act in New Zealand.

"*Inland Revenue Commissioners* v. *Clay*, related to the valuation of a house which was admittedly of no greater value than £750 to any prospective purchaser except the trustees of an adjoining nurses' home who were desirous of extending their premises. The trustees accordingly purchased the house for £1,000 and the owner thus received £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by Scrutton, J., and subsequently by the Court of Appeal, that £1,000 was the value of the house to a willing seller. It should be remembered that the Court was required to ascertain the amount which the land if sold in the 'open market' by a 'willing seller' 'might be expected to realize.' The contention that the vendor by holding out for a price of £250 beyond what might be deemed the normal price of £750 was not a 'willing seller' was shortly disposed of on the ground that a willing seller should not be compelled or expected to sell at less than his property might reasonably be expected to realize or, in short, that a person willing to sell at the best price obtainable at the crucial time and in all the circumstances is to be deemed in law a willing seller. As to a sale in 'open market' it was contended that the Court should disregard entirely any price above the normal price which a

particular person for particular reasons of his own might be prepared to pay. It was further contended that an auction sale should be envisaged and that it should be assumed that all average purchasers, except the particular purchaser with a special interest, would drop out of the auction on reaching the normal price and that the property would therefore be knocked down to the particular purchaser at a nominal amount or at the amount of one bid above the normal price. Both of these contentions were rejected by Scrutton, J., and subsequently by the unanimous decision of the Court of Appeal. Swinfen Eady, L.J., said: 'The Solicitor-General has contended . . . that we must disregard the fact that the property has a special value to one particular person, who would be willing to give substantially more than any other person, and also disregard the influence upon the market which the knowledge of this fact would create. He further urged that at most there could only be allowed some slight increase on what he contended would otherwise be the market value of the land, so as to represent the amount of one bid at an auction which the particular person would probably make over all other persons to secure the property . . .

'The Solicitor-General contended that as the section said "if sold at the time in the open market," the price which only one particular buyer was prepared to pay must be excluded from all consideration; it might possibly be a fancy price which had no relation to market price; that a reference to open market showed that the statute referred to a current market price of land, a price which one or more valuers might determine to be the market value of the land.

'In my opinion this contention is unsound. A value, ascertained by reference to the amount obtainable in an open market, shows an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realize if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale . . .

'The sum of £1,000 was arrived at because that was the sum which the land if sold at the time in the open market in its then condition might have been expected to realize. It happens also to be the price actually realized, but the figure was not arrived at on the latter ground' [1914] 3 K.B. 473, 474, 477. Pickford, L.J., said: 'In this case the house was only worth £750 if it were sold as a dwellinghouse, and, unless there were some other elements to be considered, that would be its value. But there was another element here—*i.e.*, the fact that the trustees of the nurses' home wished to buy the house, and were willing to give more than its value as a dwelling for it, although it was not known to what price they would go, and the exact amount of knowledge of their intentions amongst those persons who were likely to buy houses was not clearly shown.

'It is, however, impossible to suppose that the wish of the trustees to buy the house was entirely unknown to those interested in the property sales, and if the sale took place, either by auction or through an agent, the willing seller would be careful to see that that fact was made known.

'I assume that the gross value is not to be measured necessarily by the price given by a buyer who is particularly in need of the particular piece of property, but it seems to me clear that the fact of there being such a person in the market must have an influence on the value in the open market . . .

'It is not denied by the appellants that the wish of the trustees to buy the house is a fact to be considered, but it is said that the only effect to be given to it is that a small sum is to be added to the value of £750 to represent a final bid made by the trustees in order to acquire the property. This seems to me to be a fallacy . . .

'I do not think that the effect of the needs of a probable purchaser can be confined to the amount of the one bid which will take the offer above the bare dwellinghouse value' *Ibid.*, 478, 479, 480.

"The facts in *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam*, are by no means so similar to the present case as those in *Inland Revenue Commissioners* v. *Clay*, but the principles in issue were substantially the same and the judgment of Lord Romer gives the authority of the Privy Council to the proposition that the argument based upon an imaginary auction is unsound. After a lengthy consideration of the use of a hypothetical auction as a means of estimating value, Lord Romer concludes that consideration of such a supposed auction would have been an entire waste of the arbitrator's imagination and he adds: 'The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination' [1939] A.C. 302, 316; [1939] 2 All E.R. 317, 323.

"The decision is also particularly referable to the present case in that it gives unconditional support to the principles laid down in *Inland Revenue Commissioners* v. *Clay* and with specific reference to *Clay's* case Lord Romer said: 'Had the house in that case been acquired compulsorily by a railway company or local authority . . . before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1,000 and not merely £750.' *Ibid.*, 317; 324.

"It is conceived that his Lordship's meaning is that for all purposes, and whether in respect of a private sale or of a compulsory taking, the market value of the property in *Clay's* case must be deemed to be £1,000, or in other words that the sum of £250 assessed as the value of the potentiality must for all purposes be deemed to be part of the market value of the property at the relevant date.

"The facts in respect of the present application are as follows: The purchasing company, A. Brothers, Ltd., is one of the largest retail stores in Gisborne. It has two substantial establishments but the one which is relevant to this application is a three-storey concrete building situated on a corner site in the busiest part of the town. It is of importance to note that this building occupies the whole of the company's land and is all being fully used, so that at present the company is entirely without yard space for the loading and unloading of its goods garage accommodation for its vehicles, bulk storage accommodation, and space for the expansion and development of its business. It was not disputed that the firm regularly has to unload and even unpack cases of goods on the footpath and that it is urgently in need of bulk storage and garage accommodation as well as of premises in which to manufacture furniture. Handling as it does all lines usually handled by general stores, including farm produce, and situated as it is in the centre of a prosperous and growing farming district, the Court has no hesitation in accepting the view that A. Brothers, Ltd., is greatly inconvenienced by lack of space and is urgently in need of a further area of land for the normal development and expansion of its business.

"It is further obvious that an adjoining section offers great advantages to A. Brothers, Ltd., over any other section which they might secure. The land at present under consideration is the only available area adjoining the firm's premises and no evidence was submitted to suggest that other suitable land was available within a reasonable distance. The Court is therefore satisfied that this property has a very special value to A. Brothers, Ltd., and that a potential value attaches to it for that reason. It is also satisfied that this potentiality existed to a substantial degree in December, 1942. The firm's present building has been erected for some years prior to 1942, and the general standing of the firm and the nature of its business was the same at that date as at the present time save that no doubt its business, and the urgency of its need of room for expansion, has increased in the intervening years. The East Coast Railway was opened for traffic in 1942 and Grey Street is the principal thoroughfare leading from the centre of Gisborne to the railway station. It is reasonable to suppose that there was in 1942 a generally accepted belief that the opening of the line would initiate an era of development and prosperity in Gisborne and we have no doubt that the potential value of Mr. S.'s section to A. Brothers, Ltd., would be clear not only to the directors of the firm but also to any well informed member of the public at that time. The evidence went further than mere probability and showed that prior to 1942 A. Brothers, Ltd., had attempted to purchase the section from Mr. S. but his price of £2,500 was deemed too high at the time and negotiations fell through. It was further given in evidence that but for the natural recession of trade due to the war and the limitation imposed upon the firm's activities by petrol restrictions and the shortage of motor vehicles, the firm in the normal course of its development would have deemed it necessary to purchase this section in 1942 at any reasonable price for which the vendor might have been willing to sell.

"The Court is of opinion that the present case has much more in common from a factual point of view with *Inland Revenue Commissioners* v. *Clay* than *Lehmann's* case. In the present case, as in *Clay's* case, there was at the relevant date an adjoining owner ready, willing, and anxious to purchase the land for its own purposes at a price substantially above what would otherwise have been deemed the normal price.

(To be concluded.)

SUMMARY OF RECENT JUDGMENTS.

(*Concluded from p. 145*)

AUCKLAND ELECTRIC-POWER BOARD v. PUBLIC TRUSTEE AND ANOTHER.

JUDICIAL COMMITTEE. 1946. July 15, 16, 17; October 10. LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS, LORD DU PARCQ, LORD NORMAND.

Electrical-power Board—Electrical Supply Regulations—Electrical Wiring Regulations—Regulations purporting to be made in Exercise of Statutory Power—Regulation requiring Power Board to make Periodical Inspections and Tests of Consumer's Installation at intervals of not more than Five Years to ascertain Installation's Freedom from Electrical Hazard—Regulation obliging Power Board to discontinue supply of Consumer whose Installation in Dangerous Condition—Whether such Regulations are ultra vires*—Public Works Act, 1928, s. 319 (2) (b)—Electrical Wiring Regulations, 1935* (1935 New Zealand Gazette, *2539*), *Regs. 12–02, 12–03—Electrical Supply Regulations, 1935* (1935 New Zealand Gazette, *2496*), *Regs. 51–43, 52–01, 52–03.*

Section 319 of the Public Works Act, 1928, applies only to electric lines of the Power Board licensee (as defined in subs. 3 of that section), including such installations (if any) on the premises of consumers as are the property and under the control of the licensee, and has no reference to lines which are the property and under the control of the consumers. The regulation-making power conferred by s. 319 (2) (*b*) relates, therefore, only to the use and management of the licensee's works and lines. Consequently, any regulation that purports to constitute obligations on the Power Board's part of repair and maintenance in respect of consumer's lines and installations is *ultra vires* the power conferred by s. 319.

It follows, therefore, that Regs. 51–43, 52–01, and 52–03 of the Electrical Supply Regulations, 1935, submitted as the foundation of the appellant's liability, were *ultra vires* and ineffectual for that purpose. Regulation 12–02 of the Electrical Wiring Regulations, 1935, applies only when there are new installations on the consumer's premises: and was therefore inapplicable to the facts of this case.

The allegation of negligence at common law, altogether apart from any breach of regulations, on which the judgment of *Fair*, J., was based in the Court of first instance, and which found no support in the Court of Appeal, was not maintained before their Lordships, and it accordingly was dismissed from further consideration.

Judgment of the majority of the Court of Appeal, *Callan*, *Kennedy*, and *Northcroft*, JJ., *Sir Michael Myers*, C.J., and *Blair*, J., dissenting, reported [1944] N.Z.L.R. 782, 801, reversed; and the judgment of *Fair*, J., set aside.

Counsel: *Sir Valentine Holmes*, K.C., and *H. M. Rogerson* (of the New Zealand Bar), for the appellant; *C. L. Henderson*, K.C., and *Maurice Smith*, for the respondents.

Solicitors: *Bartlett and Gluckstein*, London, agents for *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the appellant; *Wray, Smith, and Co.*, London agents for *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the respondents.

MOON v. KENT'S BAKERIES, LIMITED (No. 2).

COURT OF APPEAL. Wellington. 1946. September 16, December 12. O'LEARY, C.J.; BLAIR, J.; KENNEDY, J.; FINLAY, J.

Practice—Appeals to Privy Council—Application for leave to Appeal—Action claiming Annual Holiday Pay—Interpretation of term "Holiday pay" in order to ascertain Workers' Annual Holiday Pay—Question thrice litigated—Whether Civil Right of Value of £500 involved—Whether Question of Great General and Public Importance—Insufficient Evidence that Decision would call for Application to other Industries—Whether made final by s. 67 of the Judicature Act, 1908—Decision of Court of Appeal final—Judicature Act, 1908, s. 67—Annual Holidays Act, 1944, ss. 2, 3—Privy Council Appeals Rules, 1910, R. 2 (a) (b).

The appellant, a baker in the employ of the respondent company, sued in the Magistrates' Court for £4, which he alleged was due to him under the Annual Holidays Act, 1944. The case turned upon the interpretation of the term "holiday pay" (as that term is used in the statute), for the purpose of ascertaining the pay to which the worker was entitled for his annual holiday under s. 2 (1) of the statute and under the relevant award.

A Stipendiary Magistrate decided in favour of the appellant. An appeal to the Supreme Court was allowed. On appeal, with leave, the Court of Appeal restored the judgment of the Magistrates' Court.

The respondent applied under R. 2 (*a*) of the Privy Council Appeals Rules, 1910, for leave to appeal to His Majesty in Council from the judgment of the Court of Appeal.

Held, by the Court of Appeal, 1. That the case did not fall within R. 2 (*a*) because, (per *Blair* and *Finlay*, JJ.), since there was no agreement that the case was accepted as a test case by ascertained parties on both sides, the financial interests of other parties affected by the judgment could not be taken into account.

2. That, there being insufficient evidence that the decision sought to be appealed from would call for application to other industries, and the respondent having already had the benefit of three hearings, the question involved in the appeal was not one which, by reason of its great general or public importance, ought, under R. 2 (*b*), to be submitted to His Majesty in Council for decision.

Macfarlane v. *Leclaire*, (1862) 15 Moo. P.C.C. 181; 15 E.R. 462, and *Allan* v. *Pratt*, (1888) 13 App. Cas. 780, applied.

Good v. *Bruce* (*No. 2*), [1917] N.Z.L.R. 919, *Gundagai Corporation* v. *Norton*, (1894) 15 N.S.W.L.R. (L.) 459, *Bailey* v. *Port of Melbourne Corporation*, (1888) 14 V.L.R. 260, and *Associated Motorists Petrol Co., Ltd.* v. *Bannerman* (*No. 2*), [1943] N.Z.L.R. 664, referred to.

Per *Blair*, J. (the other members of the Court not expressing any opinion), That the effect of s. 67 of the Judicature Act, 1908, was to make the decision of the Court of Appeal final, and that, therefore, the Court of Appeal had no jurisdiction to grant the leave sought.

Counsel: *A. J. Mazengarb* and *Rose*, for the appellant, to oppose; *Foot*, for the respondent, in support.

Solicitors: *J. F. W. Dickson*, Auckland, for the appellant; *Lisle Alderton and Kingston*, Auckland, for the respondent.

O'MEARA v. WESTFIELD FREEZING COMPANY, LIMITED.

COURT OF APPEAL. Wellington. 1946. September 26. 1947. January 31. SIR HUMPHREY O'LEARY, C.J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Damages—Workers' Compensation—Law Reform—Damages recoverable for Benefit of Deceased Worker's Estate—Action by the Representative of a Deceased Worker, accidentally Killed during course of Employment, for Damages for the curtailment of such Worker's expectation of Life—Whether such Action maintainable—"Worker"—Workers' Compensation Act, 1922, s. 55—Law Reform Act, 1936, s. 3—Statutes Amendment Act, 1937, s. 17.

Section 55 of the Workers' Compensation Act, 1922, was not impliedly repealed by s. 3 of the Law Reform Act, 1936. Section 17 of the Statutes Amendment Act, 1937, applies only to causes of action which survived by virtue of Part I of the Law Reform Act, 1936, and does not apply to causes of action under s. 55 of the Workers' Compensation Act, 1922.

Therefore, the representative of a deceased "worker," as that term is defined by the Workers' Compensation Act, 1922, whose death was caused by an accident, may maintain a claim for damages for the curtailment of such worker's expectation of life.

Forrest v. *Kaitangata Coal Co., Ltd.*, [1939] N.Z.L.R. 910, approved.

Seward v. *Vera Cruz*, *The Vera Cruz*, (1884) 10 App. Cas. 59, *Clack* v. *Sainsbury*, (1851) 11 C.B. 695; 138 E.R. 648, *Re Leake, Ex parte Warrington*, (1853) 3 DeG.M. & G. 159; 43 E.R. 64, and *Leivers* v. *Barber, Walker, and Co., Ltd.*, [1943] 1 K.B. 385; [1943] 1 All E.R. 386, applied.

So held by the Court of Appeal on motion for judgment by the plaintiff and on motion for judgment for the defendant *non obstante veredicto*, removed into the Court of Appeal for argument and determination.

Counsel: *A. K. Turner* and *Haigh*, for the plaintiff; *North*, for the defendant.

Solicitors: *F. H. Haigh*, Auckland, for the plaintiff; *Sellar, Bone, and Cowell*, Auckland, for the defendant.

In re FOWLER (DECEASED), AMOS AND ANOTHER v. COOKSON AND OTHERS.

SUPREME COURT. Christchurch. 1946. October 8; November 15. SMITH, J.

Will—Construction—Shares of Children in Residue—Whether vested subject to being divested—Whether Provision for Substitution of Children for Deceased Parents an alternative substitutional Clause or Alternative Original Clause—Children taking Proportion of Share of Child dying without Issue—Whether Survivorship referable to Death of Such Child or to Period of Distribution—Double Accruer Clause—"Surviving."

A clause in the will of a testator contained the following directions:—

"And upon final payment of the said purchase money, for the said freehold property there shall be a final distribution of the balance of my real and personal estate and I direct that such balance shall be paid to my said children in the shares hereinafter mentioned that is to say to my son Harry Fowler one share to my daughters Agnes Cookson one share, Elizabeth Amos one share, Florence Mayo one share, Lucy Minnis two shares, Emily Ann Fowler two shares and Mary Ann Fowler two shares . . . Provided always that if any child of mine shall die during my lifetime or before the final distribution of my estate then I direct that the children of such deceased child or children (if any) shall take (equally as between themselves) the share or shares to which their his or her parent would have taken had he or she survived me and the time of such final distribution And if there shall be no lawful issue of such deceased child or children then the share or shares of such deceased child or children shall go to my surviving children other than the said John David Fowler in the same share as such surviving children take in the final distribution of my estate."

In his fifth codicil, the testator made the following declarations:—

"And I declare that if any legacy or gift under my said will or any codicil thereto shall lapse or fail to become absolutely vested, then every such legacy or gift shall be held in trust for such one or more of my children as shall survive me and the time of such lapse or failure to become vested in equal shares."

The child John David Fowler, who had received a specific devise of land, was excluded from the residue. Another child, Mary Ann Fowler, died, without issue, before the date of final distribution. It was agreed that her share passed to the surviving children of the testator.

On an originating summons to ascertain who were the legatees of the residue under the will, and to determine rights of living children and of the persons who rightly had claims through deceased children,

Held, 1. That the share or shares of each named child in the residue vested in him or her respectively on the testator's death, but were subject to being divested in the event of the death of the child before distribution.

Forsyth v. *McGill*, (1895) 13 N.Z.L.R. 377, and *Public Trustee* v. *Batkin*, [1928] N.Z.L.R. 558, applied.

2. That the whole provision beginning "Provided always" was an alternative substitutional clause, not an alternative original clause.

Lanphier v. *Buck*, (1865) 2 Drew. & Sm. 484; 62 E.R. 704, applied.

In re Douglas, [1918] N.Z.L.R. 594, considered and distinguished.

3. That under the second part of the substitutional clause, the "surviving" children might each acquire a fixed proportion of the share or shares of any child dying without issue before the date of distribution.

4. That the testator had so framed his will that the general rule of construction (that where there is a gift to a number of persons and the survivors, or where there is a postponed gift to persons surviving, in the absence of a sufficient indication of a contrary intention, the survivorship is referred to the period of distribution) did not apply in the present case; and, therefore, that the surviving children of the testator who took the two shares of Mary Ann Fowler, deceased, were those children (other than John David Fowler, who was excluded from the residue) who survived Mary Ann Fowler.

Ive v. *King*, (1852) 16 Beav. 46; 51 E.R. 693, applied.

Le Jeune v. *Le Jeune*, (1837) 2 Keen 701; 48 E.R. 799, *White* v. *Baker*, (1860) 2 DeG.F. & J. 55; 45 E.R. 542, *Hobgen* v. *Neale*, (1870) L.R. 11 Eq. 48, and *Moate* v. *Moate*, (1852) 16 Jur. 1010, referred to.

5. That, where there is a double clause of accruer, the one clause may operate on shares accrued under the other.

Eyre v. *Marsden*, (1839) 4 My. & Cr. 231; 41 E.R. 91, and *Leeming* v. *Sherratt*, (1842) 2 Hare 14; 67 E.R. 6, applied.

Therefore, as the two parts of the substitutional clause operated as a double accruer, both the original and accruing shares of the testator's children who died before the date of final distribution leaving children vested in their respective children, subject to the following qualification: that grandchildren who take by substitution must survive their parents, though not necessarily the life tenant.

Lanphier v. *Buck*, (1865) 2 Drew. & Sm. 484; 62 E.R. 704, and *In re Monro*, [1934] G.L.R. 21, applied.

Counsel: *Charles*, for the plaintiffs; *Hanna*, for the first-named defendants; *Dr. Haslam*, for the second-named defendants; *Lascelles*, for the third-named defendants; *Gee*, for the fourth and fifth-named defendants and the estate of Hesta Dalton, deceased; *A. W. Brown*, for the estate of Harry Fowler, deceased; *M. J. Gresson*, for the estates of James Amos, Herbert Amos, and Elsie Thomson, respectively, grandchildren who predeceased their parents.

Solicitors: *Orbell and Charles*, Ashburton, for the plaintiffs; *H. H. Hanna*, Christchurch, for the first defendants; *A. L. Haslam*, Christchurch, for the second defendants; *Weston, Ward, and Lascelles*, Christchurch, for the third defendants; *L. W. Gee*, Christchurch, for the fourth and fifth defendants; *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the estate of Harry Fowler, deceased; *Wynn-Williams, Brown, and Gresson*, Christchurch, for the estates of James Amos, Herbert Amos, and Elsie Thomson.

EDMUNDSEN AND OTHERS v. LOUDOUN AND ANOTHER.

SUPREME COURT. Napier. 1946. November 6, 20. O'LEARY, C.J.

Trusts and Trustees—Breach of Trust—Carrying-on of Business after Date fixed by Testator for Sale and Division of Property—Action for Damages—Petition for Relief from Personal Liability—No Application to Court for Order sanctioning such Carrying-on—Reasonable period to allow therefor—Method of Ascertainment of Loss to Trust Estate—Whether Trustees entitled to Credit for Increase in Price of Chattels obtained by Delay in Sale—"Innocent"—Trustee Act, 1908, ss. 89, 98.

A testator, who owned a freehold property with a brick-making business carried on thereon, by his will directed his trustees to carry on that business for a specified period, and, at the termination of that period, to sell the property and business and to divide the proceeds amongst the persons entitled thereto. That period terminated in 1939. From the date of such termination until the end of 1943, the business of brick-making was carried on by the trustees. During 1944, the manager of the works, whose salary was £6 per week, continued in control of the premises, selling any stock of bricks on hand, and assisting in, and eventually bringing about, a sale in 1945.

Beneficiaries and trustees in the estate of deceased beneficiaries claimed damages from the defendant trustees of the testator's estate for the following alleged breaches of trust: (*a*) In respect of the failure to sell the property and the brick-yard at the expiration of the period of twenty-one years, and in not selling until 1945; and (*b*) in carrying on the business from March 14, 1939, onwards without lawful authority to do so, and thereby incurring loss.

The defendant trustees petitioned the Court for relief under s. 89 of the Trustee Act, 1908, and the action and petition were, by consent, heard together.

Held, 1. That, upon the facts, the sale could not have been effected earlier than it was; and there was no breach of trust in this respect.

2. That, as the trustees had never applied to the Court for an order under s. 98 of the Trustee Act, 1908, sanctioning the carrying-on of the business, they had committed a breach of trust in continuing to carry it on after the termination of the period for so doing fixed by the testator.

Kirkman v. *Booth*, (1848) 11 Beav. 273; 50 E.R. 821, and *Collinson* v. *Lister*, (1855) 20 Beav. 356; 52 E.R. 639, applied.

3. That there was no acquiescence by any plaintiff in any breach of trust.

4. That, had such application been made, a period of two years for such carrying-on would not have been unreasonable.

5. That, in view of the loss made by the trustees during the two years subsequent to the termination of the period for carrying on the business, they should have closed down the premises and employed a part-time employee to see to the protection of the assets and further a sale.

6. That, considering the circumstances, and the effect of s. 89 of the Trustee Act, 1908, the trustees had acted honestly throughout, and should be given relief for the said two years; but after that date they had not acted reasonably and they could not be fairly excused for omitting at the expiration of that time to obtain the direction of the Court.

7. That, this being an "innocent" breach of trust, the liability of the trustees was to be measured by the extent of the loss or deterioration which their act or omission had caused to the trust estate.

8. That it would have been reasonable for the trustees to close down the premises and place them under the control of a part-time caretaker to prevent deterioration of the kiln and plant, to give inspection to a prospective purchaser, and to assist in promoting a sale, and his salary, for which £3 a week should suffice, and fixed charges such as rates, insurance, and land-tax, should therefore be allowed to the trustees in reduction of the loss incurred.

9. That the trustees were not entitled to credit on sale of the chattels, which brought a price considerably in excess of their original cost; because this was not a trading profit, but a profit obtained by the realization of a capital asset.

Counsel: *Willis* and *Woodhouse*, for the plaintiffs; *McLeod*, for the defendants.

Solicitors: *Kennedy, Lusk, Willis, and Sproule*, Napier, for the plaintiffs; *Sainsbury, Logan, and Williams*, Napier, for the defendants.

McALLISTER v. PUBLIC TRUSTEE AND ANOTHER.

SUPREME COURT. Wellington. 1946. December 16, 19. SMITH, J.

Executors and Administrators—Claims—Work done under Promise of Testamentary Provision—Whether such Promise may be in respect of a Past Consideration—Necessity for Offer and Acceptance making Services or Work referable to a "promise"—Insufficiency of Mere Unilateral Expression of Intention—Whether Promise of a Specific Devise of Land within Statutory Provision—"Express or implied promise"—"Testamentary provision"—Law Reform Act, 1944, s. 3.

The expression "implied promise" in s. 3 (1) of the Law Reform Act, 1944, covers not only a promise made by a deceased person to a claimant before the consideration therefor was given, but it also covers a promise to make testamentary provision for a claimant as a reward for services before the promise was made, that is to say, a promise made in respect of a past consideration, which may be constituted by a sense of gratitude or of honour prompting a return for benefits received; but such a promise must be something more than a mere unilateral statement of intention.

To constitute a "promise" within the meaning of that word as used in s. 3 (1) of the Law Reform Act, 1944, there must be, apart from a promise by deed, an offer by the deceased contemplating acceptance and an acceptance by the claimant, thereby constituting a "promise" which is enforceable under the ordinary law where there is a consideration recognized by the law, and under s. 3 of the Law Reform Act, 1944, even when the promise is made in respect of a past consideration.

Quaere, Whether since the nature of the "testamentary provision" for a claimant is defined by the subsequent references in s. 3 (1) to an "amount" and in s. 3 (4) to a "legacy," the section would enable some "testamentary provision" in the form of the promise of a specific devise of land to be enforced under the section by assessing some pecuniary amount as the value of such devise.

Bennett v. *Kirk*, [1946] N.Z.L.R. 580, considered.

Counsel: *A. J. Mazengarb*, for the plaintiff; *Wood*, for the Public Trustee; *Tuckwell*, for the second defendant.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *Public Trust Office*, Wellington, for the first defendant; *Croker, Sunderland, Tuckwell, and Roache*, Wellington, for the second defendant.

LUDWIG v. STATE FIRE INSURANCE MANAGER.

COMPENSATION COURT. Auckland. 1946. October 3, December 18. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the course of the employment—Hernia—"Aggravation of pre-existing hernia"—Disablement—Workers' Compensation Amendment Act, 1943, s. 6.

The term "aggravation" in s. 6 of the Workers' Compensation Amendment Act, 1943, is a matter of degree: if it is serious enough to cause pain and disablement that section applies and compensation is payable; if it is not serious enough to cause pain and disablement it does not come within the section.

On the evidence in the present case, there was not sufficient to enable the Court to say that the aggravation resulted in immediate pain and disablement so as to bring the case within s. 6 of the Amendment Act, 1943, or that the incapacity resulted from the accident so as to bring it within s. 5 of the Workers' Compensation Act, 1922.

Bishop v. *Fletcher Construction Co., Ltd.*, [1945] N.Z.L.R. 128, referred to.

The learned Judge, assuming, but without deciding, that s. 6 was not exhaustive, held that it had not been found that incapacity had resulted from injury by accident.

Quaere, Whether s. 6 of the Workers' Compensation Amendment Act, 1943, is exhaustive, or, if incapacity did result from "an aggravation of a pre-existing hernia," whether compensation would be payable under s. 5 of the Workers' Compensation Act, 1922, although "immediate pain and disablement" did not result.

Counsel: *Horrocks*, for the plaintiff; *G. S. R. Meredith*, for the defendant.

Solicitors: *Holmden and Horrocks*, Auckland, for the plaintiff; *Meredith, Meredith, Kerr, and Cleal*, Auckland, for the defendant.

In re C. (DECEASED).

COMPENSATION COURT. Wellington. 1946. March 21, November 15. ONGLEY, J.

Workers' Compensation—Apportionment of Compensation—Total and Partial Dependants—Principles Applicable to Apportionment—Total Dependency Four-year-limit Rule—Whether Applicable to Partial Dependants—Illegitimate Children inadequately maintained in Deceased's Lifetime—Whether a Factor to be Considered—Rules on Distribution of Intestate Estates—Irrelevant to Apportionment of Compensation—"Dependant"—Workers' Compensation Act, 1922, ss. 4 (1) (a) (b), 31.

The apportionment of compensation under s. 31 of the Workers' Compensation Act, 1922, where there are both total and partial dependants, is not regulated according to what the parties could have recovered in an action against the employer, but the Court should have regard to all relevant circumstances. The partial dependants are, therefore, not limited to four years' contributions, as in the case of claims of partial dependants against an employer under s. 4 (1) (*b*) of the statute, in which case the total dependency four-year-limit rule under s. 4 (1) (*a*) is applied.

Kelly v. *Waimairi County*, [1928] G.L.R. 540, referred to.

Young v. *Niddrie and Benhar Coal Co., Ltd.*, [1913] S.C. (H.L.) 66; 6 B.W.C.C. 774, distinguished.

The rules relating to the division of a deceased's intestate estate are irrelevant to compensation-moneys which were never his property, and, consequently, the intestacy rules cannot be invoked to cut down the share of illegitimate children by giving to the widow anything to which otherwise she would not be entitled.

The Compensation Court is not bound under s. 31 of the Workers' Compensation Act, 1922, to perpetuate the failure of the deceased to provide his illegitimate children with adequate maintenance.

Counsel: *R. L. A. Cresswell*, for the widow and legitimate children; *Watterson*, for the illegitimate children; *D. R. Wood* for the Public Trustee.

Solicitors: *B. H. Rhodes*, Otaki, for the widow and legitimate children; *Park and Bertram*, Levin, for the illegitimate children.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Grand Juries.—Addressing a small gathering of socially-inclined practitioners in Wellington recently, the Hon. Clarence Martin, Attorney-General of New South Wales, said, "With due respect to the views of your last Chief Justice, I am astonished at the tenacity with which you cling to the grand-jury system. In my State, I am the grand jury. I say whether or not there should be a true bill." This brings up once again the vexed question of their usefulness in these days. Sir Richard Muir, who was associated with almost all the great criminal cases of his time, was loud in his condemnation of grand juries. "So far as I can see," he remarked, "the only persons who want them retained are High Court Justices. Heaven alone knows why, except it is that they would be deprived of airing their views on matters which do not really concern them." England did away with grand juries in 1933, except in London and Middlesex for certain cases, mostly of crime committed abroad. On the other hand, Sir Francis Bell vigorously resisted the proposal of the Hon. John McGregor to abolish them and to bring our law into line with that of most of the Australian States :

> If you abolish the grand jury you will abolish that means of communicating with an isolated body—the Judges—isolated by habit and tradition—isolated from public opinion except through the medium of the Press, which is no doubt the medium which gives us all most of the knowledge we have about matters outside of our own business and homes. For that reason alone, it seems to me that there is good cause for maintaining that ancient system—good reason for not casting away one fragment, however less valuable it may have become than it was in former days—one fragment of the public participation in and voice in the administration of criminal justice.

Bell had at least a measure of support from Sir Toby Belch, who declared in *Twelfth Night* that Judgment and Reason have been "Grand jurymen since before Noah was a sailor."

An Early Reporter.—Coke (1552–1634) seems to have had the faculty of expressing his ideas in pithy form and it was he who in *Sutton's Hospital* (10 Rep. 1), declared that corporations "cannot commit treason, nor be outlawed nor excommunicated, for they have no souls." This case which involved charities and the formation of corporations is an interesting sample of the peculiar arrangement of his *Reports*. The pleadings covering forty-four printed pages are set out, and are followed by a headnote giving in a summarized form the facts and points decided. Then, there is explained the way in which points arose for decision, the names of counsel, their argument with contemptuous comment thereon. After that, there follow the names of the Judges, the judicial discussion in Court accompanied by Coke's own statement, supported by authorities, of the effect of the rulings upon the points raised. That two of the Judges at first dissented and then agreed, is set out at the end of the report, together with some words of practical advice and an appreciation of Fleming, the Lord Chief Justice, who had fallen ill on the first day of the hearing and died before judgment was delivered. This is not all. The reasons for reporting the case follow, and to them is added a list of authorities not referred to in the body of the report, a list of the original Governors of Sutton's Hospital, and the changes that had taken place to date. In spite of all these idiosyncrasies, the fact remains that *Coke's Reports* extend over a period of forty years ; and the cases therein include many of great legal and constitutional importance, cited time and time again in the centuries that have followed him.

Practice Note (Slightly Acid).—*Subject-matter.*—Appointment of new "status" Judge. Puisne Judge (on meeting eminent counsel) : What do you think, Mr. Exe, of the appointment of your brother Why ? Eminent Counsel : *Your* brother, Sir ! (At this point, conversation ceases.)

Information, Please.—A practitioner who "dips his lid" many yards before he reaches a Supreme Court Judge in the street confesses to a degree of perplexity. There are two kinds of Judges known to him : (*a*) those he describes as real Judges, the Judges of the Supreme Court, and (*b*) those given, from time to time, temporarily or otherwise, the status of Supreme Court Judges, more or less, as the case may be. Now it seems that he has run across another variety. While changing a book at a borrowing library, he found that the signature ahead of his was "Mrs. Justice ." Has he overlooked, he enquires, some emergency regulation creating a new category in the judicial hierarchy, or is the Government contemplating some new concept for equalizing the sexes ? If the wife of a "real" Judge acquires the status of her husband, what status does the wife of a "status" Judge acquire ? Looks like a matter for Professor Joad !

Saline Interchange.—At the criminal sessions held in Wellington, two men were charged with stealing at the race-course moneys entrusted to them by an optimistic and credulous investor. In giving evidence as to the technique adopted by the accused, the victim said that they had taken him to a high-ranking American naval officer who was standing by the totalisator and introduced the officer as Admiral Minchen—or Kruschen : he was not sure which. "Ah !" observed Cornish, J., "an old salt, I assume." "I doubt it," replied counsel, "this was Trentham, not Epsom."

From My Notebook (Oratory Department).—"Oratory is the spendthrift of the Arts, which decks itself like a strumpet with the tags and ornaments which it steals from real superiority. The object of it is not truth but anything which it can make appear truth ; anything which it can make people believe by calling in their passions to obscure their intelligence."—J. A. FROUDE, *The English in the West Indies*. . . . "It is a thing of no great difficulty to raise objections against another man's oration,—nay, it is a very easy matter ; but to produce a better in its place is a work extremely troublesome."—PLUTARCH, *Of Hearing*. . . . "And there all my Fellow Officers, and all the world that was within hearing, did congratulate me, and cry my speech as the best thing they ever heard."—SAMUEL PEPYS, *Diary*, March 5, 1668.