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CRIMINAL LAW: ADMISSIBILITY OF EVIDENCE OF SIMILAR FACTS.

A DIFFICULTY which sometimes confronts counsel for an accused person is whether or not objection should be taken to evidence tendered by the prosecution which does not relate to the actual crime with which the accused is charged but which bears on criminal acts which, though not the subject of the prosecution, have been committed by the accused and are similar to that with which he is charged but are otherwise unrelated to it.

The judgment of our Court of Appeal in a recent appeal against conviction on two counts of indecent assault—*Reg.* v. *Hare* (to be reported)—gives a useful indication of the limits within which such evidence is admissible, though, as their Honours observe, no Court has attempted to list exclusively in detail the purposes for which such evidence is admissible. Certain broad general principles govern the matter, and these are usefully indicated in the judgment. Their Honours' references to the latest authorities and the effect of earlier pronouncements of our Court of Appeal read in the light of those authorities form a valuable guide for the future in the same class of case.

While the Court of Appeal upheld the admission by the learned trial Judge of the evidence to which objection had been taken, it granted a new trial on a wholly different ground of appeal, in which objection was taken to the trial Judge's direction to the jury in relation to corroboration.

The counts on which the appellant, Hare, was convicted charged indecent assaults on two girls—namely, E., aged twelve years and four months, and J., aged ten years and seven months. J. was a daughter of the appellant, and E. was a daughter of a neighbour and an associate of J.'s. The assaults were alleged to have occurred in a factory that the appellant occupied in connection with his work. The "similar facts" deposed to were incidents that were alleged to have occurred between the accused, on the one hand, and the two girls named and a third and younger girl, or one or more of them, on the other hand, at various times and places. One of the incidents alleged to have taken place with the third girl on March 10, 1951, was the subject of the third count against the appellant. On that count he was acquitted. The Court of Appeal pointed out that no evidence as to that incident would be admissible on the new trial of the appellant, but, subject to that reservation, all the evidence of the similar facts was, in their Honours' view, admissible.

The leading statement of the law as to the admissibility of similar facts on other occasions is that appearing in the oft-quoted extract from the judgment of the Privy Council in *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, 65:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

As we have already said, their Honours observed that no Court has attempted to list exhaustively in detail the purposes for which such evidence is properly admissible within the second principle so stated. Indeed, they added, the statement of Lord Sumner in *Thompson* v. *The King*, [1918] A.C. 221, 232, which was agreed with and adopted with one qualification by the Judicial Committee in *Noor Mohamed* v. *The King*, [1949] A.C. 182, 191, 192; [1949] 1 All E.R. 365, 370, shows that the only condition of its admissibility is that it is relevant to an issue raised in substance in the case. Lord Sumner said ([1918] A.C. 221, 232):

> No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.

The qualification added by their Lordships in *Noor Mohamed* v. *The King*, [1949] A.C. 182, 191, 192; [1949] 1 All E.R. 365, 370, is as follows:

> Their Lordships respectfully agree with what they conceive to be the spirit and intention of *Lord Sumner's* words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by *Lord Sumner* must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the prosecution prove its case, if it can," and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence.

Our Court of Appeal pointed out that that qualification relates only to the question as to what should be treated as an issue raised in substance; it does not affect Lord Sumner's statement that the condition of admissibility is the relevance of the evidence to an issue raised in substance.

In the opinion of the Court of Appeal, on the application of the foregoing general principles, the evidence objected to was admissible to rebut the defence that necessarily arose that the association of the two girls with the appellant in the factory was an innocent association.

Their Honours then turned to an earlier decision of the Court of Appeal, *R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581, where, in the course of its judgment, the Court, at p. 587, said:

> Now, in the present case, is proof that the prisoner tried to get into one sister's bed relevant to a charge that he did, in fact, on the same night or on the following night, or, for that matter, on a night or nights during the period stated in the second count, get into another sister's bed? It is to be remembered that accused was *in loco parentis* to these children. It is to be remembered also that he had his own bed in another room, from which his wife was, for the time being, absent. We think that the evidence of the attempt to get into A.'s bed was relevant to, and probative of, his actually getting into O.'s bed, for the reason that it tended to rebut a defence of innocent association between one who was *in loco parentis* to the children and the girl O. If A.'s evidence had not been given, it could have been urged on behalf of the accused—and, if it could not have been urged, the jury could have thought it—that accused, if he was in the children's bedroom and near their bed, might have been there for an innocent purpose, such as seeing that the children were sufficiently covered while asleep.

That case their Honours considered to be directly in point.

Leading counsel for the appellant had submitted that the judgment in *Ratu Huihui's* case and the majority judgments in *R.* v. *Rogan*, [1916] N.Z.L.R. 265, were no longer authoritative since the judgment of the Judicial Committee in *Noor Mohamed* v. *The King*, [1949] A.C. 182; [1949] 1 All E.R. 365. In particular, he submitted that this was so as regards *R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581, because the judgment in that case was based on *R.* v. *Sims*, [1946] K.B. 531; [1946] 1 All E.R. 697, which was subsequently criticized in *Noor Mohamed's* case, [1949] A.C. 182, 194; [1949] 1 All E.R. 365, 371.

In their Honours' opinion, the judgment in *Noor Mohamed's* case does not invalidate the judgment in *R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581. It was, they said, the approach of the Court of Criminal Appeal in *R.* v. *Sims*, [1946] K.B. 531, 539; [1946] 1 All E.R. 697, 701, to the question of the admissibility of the evidence that was criticized by the Judicial Committee. That approach is set out in the judgment of the Court of Criminal Appeal as follows:

> If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view.

The Court of Appeal in *R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581, did not proceed on the second of these methods of approach (the one that was subsequently critized), but, as appears from the judgment in that case, at p. 585, on the first of these methods of approach, a method of approach that is fully in accordance with authority.

In *Hare's* case, the Court of Appeal considered the majority judgments in *R.* v. *Rogan*, [1916] N.Z.L.R. 265; but their Honours concluded that, in so far as these judgments proceeded on the basis that the questioned evidence was admissible to rebut a defence of innocent association, they were not invalidated by the judgment in *Noor Mohamed's* case. In so far as these judgments proceeded on the basis that the evidence was admissible as establishing a system, their Honours said that they might take a different view, but need not further consider this point.

In *R.* v. *Hall*, [1952] 1 All E.R. 66, Lord Goddard, L.C.J., in delivering the judgment of the Court of Criminal Appeal, said, at p. 69:

> In future it would be desirable that a Court which has to deal with a case of this kind should remember that the criticism which was passed on *R.* v. *Sims* ([1946] 1 All E.R. 697) was passed on one passage only in the long judgment, and remember that no Court has yet thrown any doubt on this passage in that case, which, I think, sums up the matter: "In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust."

Leading counsel for the appellant had referred to *Harris* v. *Director of Public Prosecutions*, [1952] 1 All E.R. 1044, but the Court of Appeal did not think that that case helped the appellant in the case before them. In *Harris's* case, the evidence of seven thefts was held by the House of Lords irrelevant and inadmissible on a count relating to an eighth theft. That was because, as is explained by Lord Morton of Henryton, at p. 1052, "the appellant was not proved to have been near the shop or even in the market, at the time when these [first seven] thefts occurred", and the evidence therefore did not provide confirmation of his identity as the thief on the last occasion. Accordingly, it did not rebut a defence as to identity or any defence open to the accused, and was inadmissible on application of the principle laid down in *Makin's* case, [1894] A.C. 57, 65.

For the appellant in *Hare's* case, it had been urged that the evidence must be limited to acts of a precisely similar nature; and *R.* v. *Fisher*, [1910] 1 K.B. 149, *R.* v. *Rodley*, [1913] 3 K.B. 468, and *R.* v. *Rogan*, [1916]

N.Z.L.R. 265, 336, 337, were cited in support of the view that the evidence of the game of "straws" should be excluded. But the view taken by the Court of Appeal was that none of these cases was really in point. The evidence of the game of "straws" and other familiar behaviour, if accepted, was, their Honours thought, directly relevant as showing that over a period of time the appellant had established a relationship between himself and E. and J. which was certainly very different from what the appearances would otherwise have indicated. The evidence was therefore admissible, notwithstanding that it disclosed the commission of other offences. And it was none the less admissible because some of the evidence spoke of indecent conduct and behaviour, but not of assault.

On that point, their Honours said that the issue before the jury was indecent assault. Consent is irrelevant. Evidence of other indecent conduct and behaviour is evidence of a "similar nature". It is different in form, but not in nature. The appellant was the father of one child and had taken an interest in the neighbour's child. He had admitted that on the day in question he took both these children into his business premises and shut the door. On the face of it, this was an innocent thing to do, the circumstance that the door was shut, in their Honours' opinion, not inviting by itself a sinister inference. Once, however, the evidence objected to is admitted to rebut the defence of innocent association, such evidence, if accepted, tends to establish the guilty relationship that is alleged to have existed, and gives support to the children's account of what happened there.

Counsel for the appellant further submitted that, even if the evidence of previous indecencies with one child were admissible on the count relating to that child, the jury ought to have been warned that it was inadmissible on the count relating to the other child. The Court of Appeal held that this was not so, citing, in support, *R.* v. *Rogan*, [1916] N.Z.L.R. 265, *R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581, and *R.* v. *Hall*, [1952] 1 All E.R. 66.

The Court agreed with the submission that the evidence was not admissible for the purpose of testing the reliability of the evidence of the complainants and the weight to be attached to their evidence; and that there was no authority for using the evidence for that purpose. But, their Honours added, once it is admitted on proper grounds, it is, in their opinion, available for that purpose.

In their Honours' view, the real value of the evidence of similar happenings when admitted is that, if accepted, tending as it does to negative any defence of innocent association, it thereby gives strength to the evidence of the actual occurrence.

E. and J.'s account of being taken to the appellant's business premises and there assaulted standing alone may well be unconvincing as an isolated incident. If, however, there is evidence of previous association of a similar or like nature, then their account of the happenings on December 5, 1951, is more convincing.

In view of the conclusion at which they had arrived, their Honours did not find it necessary to consider the application to the circumstances of the present case of the decision in *R.* v. *Ball*, [1911] A.C. 47.

The final question to be considered was whether the evidence of similar facts should have been excluded in the exercise of a judicial discretion. They did not consider that it should so have been excluded. The principle appealed to is that set out in the judgment in *Noor Mohamed's* case, [1949] A.C. 182, 192; [1949] 1 All E.R. 363, 370:

> It is right to add, however, that in all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge.

In their opinion, the evidence was substantial, so far as the purpose was concerned for which it was admissible.

It had, however, been contended for the appellant that the discretion of the learned trial Judge should particularly have been exercised against the admission of this evidence because the evidence, it was said, was confused, confusing, and contradictory as to what occurred, as to where it occurred, and as to who was present. Certain details were given of localities and the like, and, in their Honours' opinion, there was sufficient particularity about the evidence, having regard to the fact that it was that of young children, who could not be expected to remember dates. The Court was told that the learned Judge did, in fact, suggest to the Crown Prosecutor that he limit the evidence to matters within two years of the date set out in the counts, and that the Crown Prosecutor endeavoured so to do. The Court of Appeal did not think that there was any reason why the Judge in the exercise of his discretion should have done any more than that.

Before we leave this matter, it may be useful to consider the speeches of their Lordships of the House of Lords in May of this year in *Harris* v. *Director of Public Prosecutions*, [1952] 1 All E.R. 1044, in which the principal speech was delivered by Viscount Simon, with whom Lord Oaksey, Lord Morton of Henryton, and Lord Tucker agreed in so far as the principles as to the admissibility of evidence were concerned, though Lord Oaksey disagreed on their application to the appeal before their Lordships' House. We need not concern ourselves with the facts. The Attorney-General, in effect, invited the House to deal with a series of authorities beginning with *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, in which limits as to the admissibility of evidence of "similar facts" had been suggested or laid down, and to decide whether the principle enunciated in *Makin's* case should now be treated as modified or its application regarded as extended. It is on that basis that Viscount Simon's speech was founded.

In His Lordship's opinion, the principle laid down by Lord Herschell, L.C., in *Makin's* case remains the proper principle to apply, and he saw no reason for modifying it. *Makin's* case was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in *R.* v. *Ball*, [1911] A.C. 47,71, and it had been constantly relied on ever since. It was, the thought, an error to attempt to draw up a closed list of the sort of cases in which the principle

operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case before the House illustrated that difficulty. His Lordship then referred to the principle as laid down in *Makin's* case, as set out (*supra*) in relation to *Hare's* case.

Lord Simon pointed out that, when Lord Herschell, L.C., speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where Magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. Avory, J., in giving the judgment of the Divisional Court in *Perkins* v. *Jeffery*, [1915] 2 K.B. 702, 707, said:

> in criminal cases, and especially in those where the Justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up.

Viscount Simon drew attention to what the Judicial Committee had pointed out in *Noor Mohamed* v. *The King*, [1949] A.C. 182, 191, 192; [1949] 1 All E.R. 365, 370, when commenting on what Lord Sumner had said in *Thompson* v. *The King*, [1918] A.C. 221, 232:

> An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying "Let the prosecution prove its case, if it can," and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence.

In Lord Simon's view, the statement of the Judicial Committee in *Makin's* case that evidence of "similar facts" may sometimes be admissible as bearing on the question whether "the acts alleged to constitute the crime charged in the indictment were designed or accidental" deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which the Judicial Committee, in its judgment delivered by Lord Herschell, L.C., indicates, either purpose is legitimate. Scrutton, J., points out the distinction very clearly in *R.* v. *Ball*, [1911] A.C. 47, 52. Sometimes the two purposes are served by the same evidence. The substance of the matter appears to be that the prosecution may adduce all proper evidence which tends to prove the charge.

Lord Simon did not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. He said ([1952] 1 All E.R. 1044, 1047, 1048):

> Where, for instance, *mens rea* is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally. *R.* v. *Mortimer* ((1936) 25 Cr.App.R. 150) is a good example of this. What *Lord Sumner* meant in *Thompson* v. *The King* ([1918] A.C. 221) when he denied (*ibid.*, 232) the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

Lord Simon added that there is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but is a rule of judicial practice followed by a Judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord du Parcq referred to it in delivering the judgment of the Board in *Noor Mohamed's* case, [1949] A.C. 182, 192; 1 All E.R. 365, 370, immediately after the passage above quoted, when he said:

> in all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge.

This second proposition, Lord Simon explained, flows from the duty of the Judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the Judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed, because its probable effect "would be out of proportion to its true evidential value": per Lord Moulton in *R.* v. *Christie*, [1914] A.C. 545, 559. Such an intimation rests entirely within the discretion of the Judge. It is, of course, clear that evidence of "similar facts" cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime: see Lord Sumner in *Thompson* v. *The King*, [1918] A.C. 221, 234. It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his *mens rea* by showing "system", or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins* v. *Jeffery*, [1915] 2 K.B. 702. But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to His Lordship, on which the Judicial Committee of the Privy Council allowed the appeal in *Noor Mohamed's* case, [1949] A.C. 182, 191, 192; [1949] 1 All E.R. 365, 370. The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman;

and, if it was not relevant, it was at the same time highly prejudicial. It is to be noted that the Judicial Committee did not question the decision in *R.* v. *Sims*, [1946] K.B. 531 ; [1946] 1 All E.R. 697.

Lord Simon then went on to examine a number of reported cases dealing with the admissibility of "similar facts" decided since *Makin's* case. Among those referred to were *R.* v. *Smith*, (1915) 84 L.J.K.B. 2153, *R.* v. *Armstrong*, [1922] 2 K.B. 555, *R.* v. *Bywaters*, (1922) 17 Cr.App.R. 66, and *R.* v. *Sims*, [1946] K.B. 531 ; [1946] 1 All E.R. 697. Rightly understood, he added, those cases do not seem to involve any enlargement of the area in which the evidence of "similar facts" might be admitted.

There was, Viscount Simon said ([1952] 1 All E.R. 1044, 1049, 1050), this to be added :

> The proper working of the criminal law in this connection depends on the due observance of both the propositions which I have endeavoured to expound in this judgment. While the prosecution may adduce all proper evidence which tends to prove the charge, it must do so with due regard to the warnings contained in the judgments of *Kennedy*, J., in *R.* v. *Bond* ([1906] 2 K.B. 389, 398) and *Viscount Sankey*, L.C., in *Maxwell* v. *Public Prosecutions* (*Director*) ([1935] A.C. 309, 320). A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided. This, in my opinion, is the way in which *Lord Sumner's* observations in *Thompson's* case ([1918] A.C. 221, 232) should be regarded. It should be noted that in that case *Lord Parker of Waddington* (*ibid.*, 231) was careful to insist that it would be wrong to treat the decision as "laying down any principle capable of general application". With this explanation, I see no reason to differ from the conclusion in *Sim's* case ([1946] K.B. 531 ; [1946] 1 All E.R. 697). I have already expressed my view of the explanation of the decision in *Noor Mohamed's* case ([1949] A.C. 182 ; [1949] 1 All E.R. 365). It appears to me to turn on the Court's view of the relevance of the earlier facts. So regarded, it is not an authority which ought to raise doubts as to the proper application of the principle in *Makin's* case ([1894] A.C. 57), or as disturbing the two governing propositions which I have set out above.

It follows that the House of Lords in *Harris's* case and our Court of Appeal in *Hare's* case are substantially in agreement regarding the unchallenged authority of *Makin's* case, and, particularly, in regard to the fact that its area has not been enlarged in the half-century which has elapsed since its principle was enunciated by the Judicial Committee. Consequently, the present position, in the light of all the authorities, may be expressed, briefly, in these terms :

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible upon the issue whether the acts charged against the accused were designed or accidental, or to rebut a defence otherwise open to him. The condition of its admissibility is that it is relevant to an issue raised in substance in the case ; and that condition is satisfied if the accused person has set up a general denial of the crime alleged, and such denial necessarily raises a particular defence.

The trial Judge in all such cases ought to consider whether the evidence the prosecution proposes to adduce as to similar facts is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the trial Judge will be right to exclude it.

SUMMARY OF RECENT LAW.

AUCTIONEER.

Goods sold at Auction for Disclosed Principal and not claimed or paid for by Purchaser—Action by Auctioneer against Purchaser by Virtue of Auctioneer's Lien or Special Property in Goods—Sale-book signed by Auctioneer on Blank Pages to be filled in Afterwards—No Memorandum in Writing—Defences available to Purchaser under Contract of Sale of Goods not available to Defendant in Action by Auctioneer by virtue of Lien or Special Property in Goods—Sale of Goods Act, 1908, s. 6. An action for the purchase price of a prefabricated cottage sold by auction was brought by the auctioneering company in its own name by virtue of its lien on, or special property in, the goods sold, and not under the contract of sale between the purchaser and the auctioneer's principal (the owner of the cottage). The auctioneer had signed blank pages of his sale-book on the day of the sale as agent for both vendors and purchasers ; there were no entries of the sales on those pages, these being filled in afterwards. In an action to recover the purchase price of chattels sold by the auctioneer, on behalf of a disclosed principal, to the defendant, *Held*, 1. That any defence, such as an alleged breach of warranty of fitness, which might be available to the purchaser of the goods under the contract of sale was not available in this action. (*Benton* v. *Campbell, Parker and Co., Ltd.*, [1925] 2 K.B. 410, followed.) 2. That no note or memorandum of the sale within s. 6 of the Sale of Goods Act, 1908, was signed by the auctioneer as agent for the vendor and the purchaser ; but, in the circumstances of the case, no note or memorandum as prescribed by that statute was necessary, because, as the auctioneer had sold the goods, not by virtue of a contract of sale of goods, but by virtue of his special property and his lien, this was not an action on a contract of sale by the auctioneer to the purchaser, but was an action to recover the purchase price as a debt due to the auctioneer by the purchaser. (*Williams* v. *Millington*, (1788) 1 H. Bl. 81 ; 126 E.R. 49, *Wilson* v. *Pike*, [1948] 2 All E.R. 267, and *Benton* v. *Campbell, Parker and Co., Ltd.*, [1925] 2 K.B. 410, followed.) *Dalgety and Co., Ltd.* v. *Fraser*. (Feilding. June 12, 1952. Coleman, S.M.)

COMPANY LAW.

Points in Practice. *102 Law Journal*, 340.

CONSTITUTIONAL LAW.

Commonwealth Council or Commonwealth Privy Council. *102 Law Journal*, 297.

CONTRACT.

Implied Terms in Contract. *102 Law Journal*, 299.

CRIMINAL LAW.

Points in Practice. *102 Law Journal*, 311.

Reason and Doubt as Elements of Proof. *116 Justice of the Peace Journal*, 338.

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Order for Respondent to pay Maintenance by Monthly Payments during Joint Lives and to give Security for Such Payments—Order sealed and not appealed from—Application by Petitioner for Variation of Order by increasing Amount on grounds of Changed Conditions of Both Parties—Respondent's Means increased—Petitioner totally Blind—Order for Payment Valid and Variable—No Jurisdiction to vary Order for Security—No Power to increase Maintenance to Level enabling Petitioner to save for Maintenance in event of Respondent predeceasing Her—Maintenance increased subject to Original Order as to Security—Divorce and Matrimonial Causes Act, 1928, ss. 33, 41. The parties, who were married in 1919, lived together until April 2, 1929, when a deed of separation was entered into, pursuant to which the wife in 1934 petitioned for a divorce, a decree *nisi* being pronounced on November 15, 1934, and a decree absolute on June 4, 1935. There was no issue of the marriage. Under the deed of separation, the husband covenanted to pay the wife a maintenance allowance of £130 per annum by monthly instalments. Those payments were made in full until February 2, 1931, when, by reason of the economic conditions then prevailing, the allowance was, by arrangement, reduced to £65

per annum, payment of the balance remaining in abeyance. In December, 1934 (after the decree *nisi*, but before the final decree), the wife applied for permanent maintenance. An order was made by *Johnston*, J., the material terms of which were as follows: "(*a*) That the respondent do pay the petitioner the sum of £130 per annum by equal monthly payments of £10 16s. 8d. from the 2nd day of June 1935 during the joint lives of the Petitioner and the Respondent." Pursuant to that order, which was sealed, security was given, as approved by the Registrar, in the form of an assignment by way of mortgage of the whole of the beneficial interest of the husband under the will of his father. In January, 1951, the wife applied for ancillary relief in the nature of an order varying the original order (so far as it referred to the payment of £130 per annum by equal monthly payments) by increasing the amount, on the grounds that the husband's means had increased, and on the further grounds, *inter alia*, that, whereas at the time of the making of the original order she was in good health and able to support herself in part by obtaining employment as a housekeeper, she had since suffered a deterioration in health by becoming totally and permanently blind, and was, therefore, unable to work, and required constant attendance. The wife's application for variation was heard by *Gresson*, J., who, on March 20, 1952, after holding that he had power to entertain the application, made an order varying the original order by substituting for cl. (*a*) a clause providing that as from January, 1952, the husband pay to the wife £650 per annum by equal monthly payments of £54 3s. 4d. during their joint lives, allowing the husband to set off against the amount accruing due any payment made by him after January, 1952. From that order the husband appealed, on the grounds that it was erroneous in law and that the amount of ancillary relief granted was excessive. *Held*, by the Court of Appeal, 1. That it was unnecessary to decide whether the order was one that could properly have been made, or whether the Court had power under s. 33 of the Divorce and Matrimonial Causes Act, 1928, to order periodical payments under subs. 2 and also to require the husband to give security for those payments in pursuance of subs. 1; but the order was in no sense a nullity, and, in view of the plenary jurisdiction of the Court, it was a valid order in all its parts, which, not having been varied on appeal, must enure and be enforceable in accordance with its terms. (*Hole* v. *Hole*, [1941] N.Z.L.R. 418, *Charles Bright and Co., Ltd.* v. *Sellar*, [1904] 1 K.B. 6, and *Blyth* v. *Blyth*, [1942] 2 All E.R. 469, followed.) (*Yates* v. *Starkey*, [1951] 1 All E.R. 732, applied.) (*Amess* v. *Amess*, [1950] N.Z.L.R. 428, referred to.) 2. That, whether the order as a whole was or was not authorized by s. 33 of the Divorce and Matrimonial Causes Act, 1928, the order for payment in cl. (*a*) was a valid order, which must be regarded as made under s. 33 (2), and it was an "order for the periodical payment of money made under the provisions" of the statute, and variable accordingly under s. 41. 3. That, in so far as the order provided for security, it could not be varied in respect of the direction to give security; and the jurisdiction to vary the order was limited to that part which directed the making of periodical payments. 4. That the Court has no power to order the husband to pay maintenance at a level which would enable the wife to save money for her maintenance in the event of the husband's predeceasing her; and, while it could have been done originally by means of a security order, the Court had no power to vary the security order that was made. (*Shearn* v. *Shearn*, [1931] P. 1, and *Fraser* v. *Fraser*, [1947] P. 58; [1947] 1 All E.R. 384, followed.) 5. That there should be a variation in the form of order directed by the learned Judge—namely, the substitution of a new clause for cl. (*a*) of the original order, to make the increase in the maintenance allowance subject to the provisions of cl. (*b*) of the original order as to security: it would be preferable, in the circumstances, to allow the original cl. (*a*) to stand, and to add after the last clause in the original order a new clause to the effect that, by way of variation of that order, the husband pay to the wife as from January 1, 1952, an additional sum of £286 per annum by equal monthly instalments during the joint lives of the parties, such additional sum not to be deemed "payments" within the meaning of cl. (*b*) of the order; and that the husband should be entitled to set off against the amount accruing under the new clause any payments made by him to the wife since January 1, 1952, in excess of the amounts payable under cl. (*a*) of the order. *McLean* v. *McLean*. (S.C. Napier. March 20, 1952. Gresson, J. C.A. Wellington. July 31, 1952. Fair, J.; Stanton, J.; Hay, J.; F. B. Adams, J.)

Nullity—Petitioner bigamously married—Real Marriage later dissolved—Right to Decree of Nullity ex debitae justitiae *in respect of Void Marriage.* The Court has jurisdiction to make a decree of nullity at the suit of a petitioner who himself has committed bigamy, and on that ground. As the petitioner in such a suit is entitled *ex debitae justitiae* to a decree of nullity, the Court has no discretion as to granting relief. (*Miles* v. *Chilton* (*falsely calling herself Miles*), (1849) 1 Rob. Eccl. 684; 163 E.R. 1178, *Andrews* (*falsely called Ross*) v. *Ross*, (1888) 14 P.D. 15, and *C.* v. *C.*, [1932] N.Z.L.R. 1425, referred to.) A decree absolute in the first instance was granted in the present case. (*D.* (*falsely called B.*) v. *B.*, (1910) 12 G.L.R. 728, *D.* (*wrongly called C.*) v. *C.*, (1912) 15 G.L.R. 253, and *S.* v. *S.* (*otherwise O'B.*), [1938] G.L.R. 193, followed.) *Hodges* (*falsely called Helleur*) v. *Helleur*. (S.C. Auckland. July 4, 1952. Finlay, J.)

Separation (*as a Ground of Divorce*)—*Allegations of Acts of Intercourse after Separation—Onus of Proof on Party alleging Them—Whether Intercourse after Separation renders Separation Agreement Ineffective for Purposes of obtaining Divorce—Divorce and Matrimonial Causes Act, 1928, s. 10* (i). The onus of proof is on the party who, in answer to a petition for divorce based on an agreement for separation, alleges that acts of intercourse took place after the separation and that accordingly the agreement for separation did not remain in full force. The Court is loath to act upon uncorroborated testimony of that kind. (*Joseph* v. *Joseph*, [1915] P. 122, applied.) (*Radley* v. *Radley*, Unreported. Auckland. October, 1937; Callan, J., referred to.) *Quaere*, Whether the judgment of the Court of Appeal in *Bennett* v. *Bennett*, [1936] N.Z.L.R. 872, that acts of intercourse after separation will render a separation agreement ineffective for the purpose of obtaining a divorce may call for reconsideration in the light of *Perry* v. *Perry*, [1952] 1 All E.R. 1076. *Wright* v. *Wright*. (S.C. Auckland. July 17, 1952. Stanton, J.)

Separation (*as a Ground of Divorce*)—*Written Cancellation of Separation Agreement—Such Cancellation executed when Wife a Minor—Wife since receiving Social Security Benefit as Deserted Wife—Reliance on Alleged Verbal Agreement to separate—Cancellation of Written Agreement not repudiated by Wife on attaining Majority—Receipt of Social Security Benefit bar to setting up Verbal Agreement to separate—Divorce and Matrimonial Causes Act, 1928, s. 10* (i). The wife in her petition alleged that during or about the month of September, 1948, the parties verbally agreed to separate, and did so separate, and had since lived apart. The parties entered into a written agreement for separation on October 29, 1948, but, by a memorandum signed on February 23, 1949, they agreed that the written agreement "is hereby cancelled and shall have no "force or effect whatever". At that time, the petitioner was eighteen years of age. The written agreement contained no reference to any earlier verbal agreement for separation, and it seemed probable that it was signed at or about the time of the alleged verbal agreement. The petitioner reached the age of twenty-one years before December, 1951. The petitioner had received a separated wife's benefit from the Social Security Department since the cancellation of the written separation agreement. The petitioner sought to rely on the verbal agreement for separation, which, she alleged, had remained throughout in full force. *Held*, 1. That the cancellation by the wife, then an infant, of the separation agreement was voidable; but she had not effectively repudiated the cancellation on attaining the age of twenty-one years. (*Nicholson* v. *Nicholson*, [1952] N.Z.L.R. 53, applied.) 2. That the continuous receipt by the petitioner, as a deserted wife, of social security benefits, which were payable only on the basis that the agreement for separation had ceased to exist, barred her from setting up a verbal agreement to separate. *Blair* v. *Blair*. (S.C. Auckland. July 28, 1952. Stanton, J.)

IMPRISONMENT FOR DEBT LIMITATION.

Jurisdiction—Concurrent Jurisdiction of Magistrates' Court and Supreme Court—Magistrate's Jurisdiction Exercisable within Limits set by Statute—Prohibition available if Magistrate goes beyond or outside Those Bounds—"Contracted the liability . . . by any fraud"—Imprisonment for Debt Limitation Act, 1908, ss. 4, 7 (d). The phrase "contracted the liability . . . by any fraud" in s. 7 (*d*) of the Imprisonment for Debt Limitation Act, 1908, refers only to liabilities intentionally contracted by means of fraud, and not to liabilities subsequently arising by way of legal sanction. (*Ingram* v. *Crawford*, [1934] V.L.R. 289, followed.) (*Newmarch* v. *Atkinson*, (1918) 25 C.L.R. 381, applied.) (*Re Hardcastle, Till* v. *Morgan*, (1882) N.Z.L.R. 1 S.C. 65, and *Boland* v. *Dobbie*, [1933] V.L.R. 1, referred to.) The jurisdiction of the Magistrates' Court under the Imprisonment for Debt Limitation Act, 1908, is concurrent with that of the Supreme Court, but only if it is exercised within the limits set by paras. (*a*), (*b*), and (*d*) of the first proviso to s. 4 of that statute. (*Te Peehi te Opetini* v. *Hewitt*, (1915) 34 N.Z.L.R. 1087, followed.) (*Hesson* v. *Spain*, (1900) 18 N.Z.L.R. 679, and *Wells* v. *Carew*,

(1900) 19 N.Z.L.R. 349, referred to.) Consequently, a Magistrate goes beyond or outside that jurisdiction in making an order, even though he makes it in open Court, unless (*a*) the order shows on its face the ground on which it is issued, and (*b*) the ground is one of the authorized grounds referred to in the statute; and prohibition will lie where the order does not show on its face that it was made on an authorized ground. (*Winiata te Wharo* v. *Airini Tonore*, (1895) 14 N.Z.L.R. 209, applied.) (*Hesson* v. *Spain*, (1900) 18 N.Z.L.R. 679, and *Wells* v. *Carew*, (1900) 19 N.Z.L.R. 349, applied.) (*Stafford* v. *Porritt and Booth*, (1911) 30 N.Z.L.R. 309, explained.) (*Coronno* v. *Burgess*, (1903) 23 N.Z.L.R. 25, referred to.) A Magistrate held that it was proved, in effect, that the judgment debtor had committed the offence specified in s. 2 (1) (*a*) of the Police Offences Amendment Act, 1935, and he therefore held that the judgment debt (which related to damage done to the wrongfully converted car while it was being negligently driven by the judgment debtor) wholly arose out of the judgment debtor's fraud and dishonesty, and was incurred by fraud; and the order for committal showed on its face that "the debt was incurred by fraud". On a motion for a writ of prohibition prohibiting the Magistrate from proceeding further on the order of committal, *Held*, granting prohibition, 1. That it was apparent on the face of the order that the judgment debt related, at least for the most part, to a liability in tort on the part of the judgment debtor for damage to a car which had arisen after he had wrongfully obtained possession of it; that this was a liability of a kind which necessarily arose by way of legal sanction after the judgment debtor had converted the car to his own use; and that, consequently, his liability for the debt was not "contracted . . . by any fraud" within the meaning of s. 7 (*d*) of the Imprisonment for Debt Limitation Act, 1908. 2. That, in making the order, the Magistrate went outside his jurisdiction, in that he contravened one of the restrictions on it which (by the conjoint effect of the two provisos to s. 4) are attached by the statute to the grant of that jurisdiction, as the order showed on its face that it was made on an unauthorized ground. (*Winiata te Wharo* v. *Airini Tonore*, (1895) 14 N.Z.L.R. 209, applied.) *Hill* v. *Hayman and Another*. (S.C. Wellington. July 23, 1952. Cooke, J.)

LAND TRANSFER.

An Englishman Looks at the Torrens System. (T. B. F. Ruoff.) *26 Australian Law Journal*, 118, 162.

LANDLORD AND TENANT.

Rack-rent and Receipt thereof. *96 Solicitors' Journal*, 372.

LICENSING.

Wine-seller's Licence—Application by Married Woman—Married Woman not qualified to be Holder of Such Licence—Licensing Act, 1908, s. 72 (3)—Licensing Amendment Act, 1948, ss. 69 (1), 70. A married woman is disqualified by s. 72 (3) of the Licensing Act, 1908, from being the holder of a wine-seller's licence. *In re Cairns's Application.* (Hamilton. July 24, 1952. Paterson, S.M.)

NEGLIGENCE.

Driver of Motor-vehicle damaging Parked Motor-car—Accident due to Driver's Sudden Faintness—Driver never having previously Fainted—Unawareness of Any Danger of Unconsciousness while Driving—Driver not Negligent. Where the driver of a motor-vehicle is unaware of the danger of unconsciousness coming upon him while driving, he is not guilty of negligence if he suffers a sudden fainting to the extent of unconsciousness. (*Billy Higgs and Sons, Ltd.* v. *Baddeley*, [1950] N.Z.L.R. 605, followed.) The appellant, while travelling along a street at about 25 miles per hour, suddenly fainted at the wheel of his vehicle. As the appellant's vehicle, out of control on account of his collapse, swerved across the street, it struck the respondent's motor-car, which was properly parked against the kerb. Immediately afterwards, the appellant recovered from the faint, got in touch with the Police, and, together with his wife, who was a passenger and who suffered a slight injury, went to a doctor. As a result of the subsequent examination, and from information supplied by the appellant, the doctor's opinion, as was shown by his report, was that the appellant was suffering from an infection of the urinary system—*viz.*, pyelitis—with which the appellant's story of feeling faint while driving was consistent. The doctor added that the appellant was not subject to fits or loss of consciousness, and was, when in good health, a fit and proper person to drive. In evidence, the appellant confirmed and amplified the facts of the symptoms surrounding his condition. He said he had been unwell for three days. On the day of the accident, he felt better, though he still felt hot and peculiar; particularly, he said the temperature was peculiar and the backache severe, and his hands and wrists were burning and aching. He spent the morning checking the stock in his motor-van, he being a travelling salesman on his own account, and did some clerical work. He then set out in his motor-truck, intending to pick up some further stock in trade and proceed on his business run. He stated that, when approaching the scene of the accident, his vision became suddenly blurred and he fainted. During the preceding days, when he had felt worse, he had not fainted, and he had never fainted in his life until he fainted just before the accident. The Magistrate found the appellant guilty of negligence, and awarded damages against him for the full amount clained (7 M.C.D. 427). On appeal from that determination, *Held*, 1. That, on the facts, the accident was solely due to a sudden and unexpected condition which the appellant did not anticipate, and which neither he nor any reasonable prudent man would have anticipated in the circumstances. 2. There was nothing upon which a finding of negligence could be founded; and judgment should have been given for the appellant. (*Billy Higgs and Sons, Ltd.* v. *Baddeley*, [1950] N.Z.L.R. 605, followed.) (*Laurie* v. *Raglan Building Co., Ltd.*, [1941] 3 All E.R. 332, distinguished.) *Robinson* v. *Glover*. (S.C. Auckland. June 19, 1952. Finlay, J.)

Last Opportunity and Contributory Negligence Act. (N. E. Burbank, Q.C.) *26 Australian Law Journal*, 167.

Negligence and Trespass. *102 Law Journal*, 325.

TRANSPORT.

Intoxicated Driver: Who May be Liable?? *116 Justice of the Peace Journal*, 370.

TRUSTS AND TRUSTEES.

Trustees' Power to Decide Question. *102 Law Journal*, 341.

WORKER'S COMPENSATION.

Liability for Compensation—Refusal of Deceased Worker to undergo Hospital Treatment—Such Refusal Unreasonable—Workers' Death caused thereby—Half-caste Maori's Prejudice against Hospital Treatment No Excuse—"Unreasonable"—Workers' Compensation Act, 1922, s. 16. The deceased met with an accident arising out of and in the course of his employment on or about August 4, 1950. He did not immediately cease work because of the accident; but he ceased work some time later, after he had been under medical treatment for a dermatitis condition which developed in the region of the sore on his head caused by the accident. He visited a doctor regularly until November 3, 1950, and was treated for a weeping dermatitis condition, which had spread from his scalp to his shoulders and chest. About November 13, 1950, at the suggestion of the foreman or some other representative of the employer, the deceased went to see another doctor, who told him to go to hospital. On November 14, the deceased entered the Taumarunui Public Hospital, which he left at the end of nine days against the wishes of the Superintendent of the hospital. As the deceased and his family were moving from the district, the Superintendent arranged with the deceased that he would go to some hospital and let him know where he was. The deceased made no attempt to carry out that arrangement. After his arrival in the Bay of Islands, the deceased visited a doctor at Russell, but nothing appeared to have been done under him. On December 18, 1950, he consulted a doctor at Kerikeri, who advised the deceased to enter hospital; but, as he would not accept that advice, an ointment for application to the affected parts was prescribed and used. Five days before the deceased's death, the doctor saw him again. His condition had deteriorated, and the doctor wanted him to go to hospital and wrote out an admission notice for him; but the deceased refused to go. The worker died on January 15, 1951, the cause of his death being toxaemia arising from acute infection from the dermatitis. According to the medical evidence, if the deceased had gone into hospital in December, there was no apparent reason why he should not have recovered from the dermatitis condition, and, if he had gone into hospital on January 10, 1951, there was a distinct possibility that his life would have been saved. *Held*, 1. That, on the evidence, if the deceased had continued, or had within a reasonable time resumed, the hospital treatment which was commenced at Taumarunui, he would have in due course recovered; and, further, that, if he had entered hospital and undergone hospital treatment as advised on December 18, 1950, he would have recovered. (*Marshall* v. *Orient Steam Navigation Co., Ltd.*, (1909) 3 B.W.C.C. 15, and *Marsh* v. *Bowlin*, [1947] N.Z.L.R. 218, referred to.) 2. That the fact that the deceased

was a half-caste Maori and that there is a prejudice on the part of some Maoris against hospital treatment did not excuse the deceased's refusal to undergo hospital treatment. (*Hamilton* v. *Tuck Bros., Ltd.*, [1940] N.Z.L.R. 895, applied.) 3. That in failing within a reasonable time after leaving Taumarunui to make arrangements to go into a hospital for treatment, and also in failing to accept medical advice to go into hospital on December 18, 1950, the deceased's refusal to submit to medica treatment was " unreasonable " within the meaning of that word as used in s. 16 of the Workers' Compensation Act, 1922 ; and that his death was caused by that unreasonable refusal. (*Gibbs* v. *Ingle*, [1941] G.L.R. 240, distinguished.) *Ashby* v. *Endean's Mill (Waimiha), Ltd.* (Comp. Ct. Auckland. May 23, 1952. Dalglish, J.).

DEATH OF THE HON. H. H. CORNISH.

Tributes from Bench and Bar.

The death occurred at Wellington on July 24 of the Hon. H. H. Cornish, who, after serving on the Supreme Court Bench from February 5, 1946, resigned on account of ill health on February 28, 1950.

On the morning of July 29, a large gathering of Wellington practitioners met at the Supreme Court to do honour to the memory of their former colleague and friend. On the Bench were the Chief Justice (the Rt. Hon. Sir Humphrey O'Leary), Mr. Justice Fair, Mr. Justice Gresson, Mr. Justice Hutchison, Mr. Justice Hay, and Mr. Justice Cooke. The Hon. Sir David Smith sat with their Honours. The Chief Judge of the Maori Land Court (Judge D. G. B. Morison) and the members of the local Magistracy were also present.

THE CHIEF JUSTICE.

The Chief Justice, in addressing the large gathering, said :

" You of the legal profession and we of the Bench are assembled here this morning to pay a public tribute to the memory of a former Judge and publicly to express the regard and affection in which he was held by us all ; and in speaking for the Bench I speak, not only for the members present, but also for those out of Wellington, and also for retired Judges who were associated with him.

" The death of our friend and old colleague, Henry Havelock Cornish, takes from us a kind and warm-hearted man beloved by all, one who was a loyal and helpful colleague, and one who, as a Judge, endeared himself to the Bar by his kindly consideration for them and their efforts when they appeared before him, and his help to them when it could be given.

" Henry Havelock Cornish had but a short career on the Bench. During his term, he was not in robust health. Ill health affected his work, and eventually, being unable to carry on, he was forced to retire long before the retiring age imposed by statute.

" His great attributes as a Judge were his kindly nature, his desire to do something for everybody, his deep human sympathy for all, which counterbalanced—and, indeed, outweighed—any deficiencies he might have had. And who, in the position he occupied, has not deficiencies ?

" He had a most varied career. Academically, he was a brilliant University student, and that he was a man of no mean ability is shown by his obtaining double first-class honours. He was a successful debater, a teacher, and a legal practitioner. Later, he was first a Professor of Law and then the Solicitor-General. Finally, he was a Judge. At the Bar, he specialized in patents and trade-mark law. Had there been more of that class of work in New Zealand, he would have been the leading counsel in it.

" He rejoiced in many friendships with people of all classes and creeds. He was tolerant, and disliked intolerance. Once you were his friend, he was your enthusiastic advocate and supporter, for evermore.

" His family life was happy, contented, and congenial. He was proud of his family, and they of him. And so they might be proud of a father who had brought them up to be members of the highest professions.

" To myself personally, he was a most loyal and helpful colleague. When I joined him, we became on the best and most intimate terms. He was ever genial and happy, and had many interests akin to my own. I recall that the last time I saw him, a few weeks ago, he was at Athletic Park, following the fortunes of his beloved University football team.

" I personally have lost a very good friend—we all have—and deeply mourn his loss. We extend to Mrs. Cornish and her family our very deep sympathy on the loss of a worthy husband and father."

THE SOLICITOR-GENERAL.

Mr. H. E. Evans, Q.C., Solicitor-General, said :

" For the second time in the short space of four months the members of the profession are gathered before your Honours on the death of a retired Judge, to pay tributes of esteem and respect to his life and work.

" The Attorney-General, who regrets his inability to be present, has requested me to associate him with this morning's tributes to the late Mr. Justice Cornish. That request gives me a welcome opportunity of recalling at the same time a personal friendship which I have very greatly valued.

" The early years of the late Judge's life—his achievements as a student at school, at the University, and in sport—were an earnest of the distinctions to which he later attained, first as a school teacher, then in legal practice, then as a University professor, then as Solicitor-General, and last in the high office of a Judge of this Court. From that office an all-too-early decline in health caused him to retire two years ago. We hoped that in retirement he would regain strength, but it was not to be, and we witnessed with regret and sympathy the evidence that relief from the strain of office was not bringing its hoped-for result.

" As was to be expected from the nature of his training, he manifested and developed a lively interest in the guiding principles of the law. The result was that his approach to his duties was not narrow or technical, but was informed with that breadth and humanity which characterized all his dealings with his fellow-men. There were many acts of his which proved his sympathetic and generous nature. I have occasion to know that those in the Crown Law Office who served under him retain very happy recollections of his kindly consideration. For myself, I have always looked back with special pleasure to the time, now twenty-seven years ago, when, in our first intimate association, we travelled in this island together, but on opposite sides, on the taking of evidence in the well-known Lysol trade-mark case, in which he displayed outstanding skill and industry and enhanced his already established reputation.

" His learning, covering much besides the law, and reflected in a cultured literary style, was the result of wide general reading, maintained notwithstanding the exacting claims always made by the law upon the time and energies of those who are engaged in its service. To give that service as a Judge in accordance with the highest traditions is truly deserving of the gratitude of the State. To that gratitude we add our respectful sympathy with his widow and family."

THE NEW ZEALAND LAW SOCIETY.

The President of the New Zealand Law Society, Mr. W. H. Cunningham, on behalf of the profession throughout New Zealand, said that he, too, would like to say a few words in tribute to the memory of the late Judge. His brilliant scholastic and University career had already been amply dealt with by the Chief Justice. It was a career of which any man might well be proud. Mr. Cunningham continued: " His period of practice at the Bar in Wellington will be covered by Mr. Blundell. I need not deal in any detail with that. It was only natural that, after he was established in practice, he should seek office in the Wellington District Law Society, and that, once on the Council of that Society, he should go for a term to the Council of the New Zealand Law Society. He served faithfully and well as a member of the Council of that Society.

" From the time when he exchanged the profession of teaching for that of the law, he devoted himself wholeheartedly to his later choice. As a result, he eventually attained the highest office which is open to members of the legal profession, a Justice of the Supreme Court, having been successively Professor of Law at Victoria College and then Solicitor-General, a really remarkable achievement. During his period as Professor of Law at Victoria College, he made the acquaintance of all the young men who were studying law there, and he never ceased, after he left the Professor's chair for that of the Solicitor-General, and, later still, when he took his seat on the Bench, to take a warm-hearted and kindly interest in the progress of his former students. When they appeared before him in the Supreme Court, they were invariably treated with kindness and consideration, and, if they had done well, he never hesitated to send for them after the case was over to give them a quiet word of encouragement. The late Judge will be gratefully remembered by the profession for his kindly and unselfish interest in the progress of all those who had chosen the law as their life work.

" His death, so soon after ill health forced his retirement from the Bench came as a shock to his numerous friends in the profession. He was a devoted husband and father, and to his widow and the members of his family I desire to tender on behalf of the profession generally our sincere and heartfelt sympathy in their great loss."

THE WELLINGTON LAW SOCIETY.

Mr. E. D. Blundell, President of the Wellington District Law Society, respectfully associated the members of the Society and their staffs in every way with the tributes which had been paid by the Chief Justice, by the Solicitor-General, and by the President of the New Zealand Law Society.

He proceeded: " For us, the death of our friend has left a deep feeling of personal loss. Although, as has been said, he was neither born nor had his early upbringing in Wellington, the whole of his professional and the bulk of his judicial life were spent in this city. During those years, his kindly and generous nature, his personal charms, his fairness, and his complete unselfishness won him a host of friends amongst his fellow-practitioners. It is as such that we offer our respectful tribute to his memory.

" Of His Honour's career, the wide range of his interests, and the record of his achievements, there is little I may add to what has been said already or is generally known. I would recall, however, that his rise to an eminence in the profession sufficient to qualify him for high office was in many ways remarkable. His work as a practising barrister and solicitor extended over the comparatively brief period of twelve years. He commenced practice on his own account in 1918, facing the prospect of building up his practice from nothing. How rapidly he did so is shown by the fact that in February, 1921, he was invited to join the then firm of Messrs. Webb and Richmond and to take over the common-law side of their practice. This he did with early and considerable success. Those of us who have walked along similar paths marvel that he could advance so far and in so short a time. We remember that he did so without the benefit of long years of experience working under and for senior counsel. His background was that of a teacher, and his mental training was that of the student rather than that of the practical lawyer. It is to be remembered also that he achieved his success at a time when the Bar in Wellington flourished under the leadership of many great barristers—Mr. Skerrett, Mr. Myers, and Mr. Gray, to mention but a few. Only a man of great natural ability and tenacity of purpose could have climbed the ladder so high in so brief a period.

" During this period, His Honour found the time to compile a Digest of the New Zealand Law Reports. He also gave considerable service to the profession. For five years he was a member of the Council of the Wellington District Law Society, and in 1927 he was President.

" When he was the presiding Judge, counsel who appeared before him and witnesses could always be sure of a courteous and attentive hearing. He was imbued with a fierce desire to see justice done. As may be expected, that very trait could, and at times did, become a fault; but it was the kind of fault which carried with it a degree of admiration.

" It would be paying an empty tribute to His Honour to suggest that his career at the Bar or his service on the Bench were free from disagreement or criticism. His special talents and his personality were such that this could not be true. But, just as he and his old friends Mr. John O'Shea and Mr. Pat McGrath could differ, at times violently, on the merits of a slow bowler or a full back and think none the worse of each other, so could we in the profession at times disagree with him and yet in no way lose our affection for the man he was. We have seen with sadness his decline in health during recent years, and we were shocked to learn of his death. To us, his death means something more than the passing of one we knew. We feel there has departed from our midst one who, during his life, had rather more than his fair share of burdens and adversity, and yet throughout in himself, in his way of living, and by his example was the very soul of kindness.

" From our own sense of loss we can have some small idea of the sorrow of his widow and family. To them we also extend our very deep sympathy."

THE SEPARATE REPRESENTATION OF VOTERS CASE.

By J. F. NORTHEY, B.A., LL.M., Dr. Jur. (Toronto).

In *Harris* v. *Minister of Interior*, [1952] 2 A.D. 428, perhaps better known as the Separate Representation of Voters case, it was held that the " entrenched sections "[1] of the South Africa Act, 1909, are alterable only in the manner provided by that Act, despite the enactment of the Statute of Westminster, 1931, and the Status of the Union Act, 1934,[2] and despite the fact that the Parliament of South Africa sitting bicamerally is not free, by a bare majority in each House, to amend those sections. Although the relevant statutory provisions and some of the principles of law involved were discussed in an earlier article ((1951) 27 NEW ZEALAND LAW JOURNAL, 140), it is convenient that they be restated briefly.

The effect of ss. 35, 137, and 152 of the South Africa Act, 1909, is that any Bill to remove from the register of voters, on the ground of race or colour only, persons whose voting rights were hitherto protected by s. 35, or to alter the equality of official languages secured by s. 137, or to amend s. 152 itself, must be passed by both Houses sitting together, and at the third reading must be agreed to by a majority of two-thirds of the total number of members of both Houses. Section 35, as amended by s. 44 of the Representation of Natives Act, 1936 (which was passed in the manner provided by ss. 35 and 152), provides as follows :

> (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person (other than a Native, as defined in s. 1 of the Representation of Natives Act, 1936) in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native voters' roll instituted under that Act from being so registered, or alter the number of the members of the House of Assembly who in terms of the said Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.
>
> (2) No person (other than a Native as so defined) who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

The validity of the Representation of Natives Act' 1936, was challenged in *Ndlwana* v. *Hofmeyr N.O.*, [1937] A.D. 229. Curiously enough, by contrast with the attack on the Separate Representation of Voters Act, 1951, the appellant in the *Ndlwana* case asserted that the Representation of Natives Act, 1936, was invalid, because, being an Act that did not fall within s. 35 of the South Africa Act, 1909, it was passed in the manner prescribed by that section—*i.e.*, by joint sitting of both Houses, and not by the two Houses sitting separately. The question for the Court was, therefore, quite different from the problem in the Separate Representation of Voters case, but extracts from the judgments, and especially from the judgment delivered by Stratford, A.C.J., were thought to cover the later case. Both the Cape Provincial Division and the Appellate Division agreed that the Representation of Natives Act, 1936, was valid. The judgment of the former Court was delivered by Van Zyl, J.P., and Sutton and Centlivres, JJ., concurred. In the Appellate Court, the judgment was written by Stratford, A.C.J., and De Villiers, J.A., De Wet, J.A., and Watermeyer, A.J.A., concurred. Van Zyl, J.P., at p. 230, stated :

> In support of the application it was in the first place urged that Act 12 of 1936, was *ultra vires* the South Africa Act in as much as it was passed by a joint sitting of both Houses of Parliament, and is not " such law " as is contemplated by s. 35 (1) of the South Africa Act.
>
> In dealing with this point it should be noted that the South Africa Act forms part of the statute law of the United Kingdom and is as such the constitution under which the Union of South Africa came into being and has functioned since its inception. Although, however, the South Africa Act legally owes its force and effect as the constitution of this country to the fact that it is a statute of the United Kingdom, it in fact had its origin in South Africa, where it was drawn up as an agreement come to by the representatives of the four constituent Colonies at a National Convention and subsequently submitted to and accepted by the Parliaments of three of the four Colonies and in the remaining Colony by a majority vote of the Parliamentary voters at a referendum. It was only after the draft South Africa Act had in that manner received the approval of the four Colonies now constituting the Union of South Africa that it was brought before and passed by the Parliament of the United Kingdom as the constitution for the Union of South Africa. It was thus an instrument created by South Africa itself for which legal effect was sought and obtained from the Parliament of the United Kingdom. It is interesting to note this because there are certain provisions in the South Africa Act of a purely South African character which have been entrenched in the Act and cannot be repealed or altered unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading shall be agreed to by not less than two-thirds of the total number of members of both Houses.
>
> *These entrenched provisions have not been repealed or altered by the Statute of Westminster.*

(The italics are mine.) The learned Judge, at p. 231, added :

> For the purposes of this case, however, it is not necessary for the Court to decide whether in view of the Statute of Westminster Parliament as ordinarily constituted can repeal or amend any of the entrenched sections: it may be that these sections can be repealed or amended either by Parliament as ordinarily constituted or by a joint sitting of both Houses, or it may be that the only proper Legislature for this purpose is a joint sitting of the two Houses. If the latter is the correct view, then, to adopt the language of *De Villiers*, C.J., in *R.* v. *Ndobe* ([1930] A.D. at p. 493) " if any other course is adopted the law cannot stand."

This opinion suggests that any statement in the *Ndlwana* case as to the effect of the Statute of Westminster, 1931, on the entrenched sections is probably *obiter*.

However, in giving his judgment on appeal, Stratford, A.C.J., at p. 236, stated :

> Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union.

[1] Sections 35, 137, and 152.

[2] This Act implements the Statute of Westminster, 1931. It declares that sovereign legislative power is vested in the Union Parliament; it excludes the operation of United Kingdom legislation unless re-enacted by the Union Parliament; and it contains other provisions intended to secure the sovereign independence of the Union.

If this statement supports the proposition that the entrenched sections may be altered by an Act of Parliament passed in the ordinary way, it is probably *obiter*. He added, at p. 237 :

> Parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of law whose function it is to enforce that will not to question it. In the case of subordinate legislative bodies Courts can of course be invoked to see that a particular enactment does not exceed the limited powers conferred. It is obviously senseless to speak of an Act of a sovereign law-making body as *ultra vires*. There can be no exceeding of power when that power is limitless.

He concluded, at p. 238 :

> the question then is whether a Court of law can declare that a Sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure—in this case a procedure impliedly indicated as usual in the South Africa Act ? The answer is that Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit ; the procedure express or implied in the South Africa Act is so far as Courts of law are concerned at the mercy of Parliament like everything else . . . The conclusion then is that the validity of Act 12 of 1936 cannot be questioned in a Court of law.

The whole tenor of the judgment of Stratford, A.C.J., suggests that, on the enactment of the Statute of Westminster, 1931, the Union Parliament became " sovereign ", and that the Courts could not question the validity of an Act of the Union Parliament, whether adopted bicamerally or unicamerally under ss. 35, 137, and 152. As has already been stated, however, it is doubtful whether this opinion formed part of the *ratio decidendi*. In the lower Court, it was not found necessary to consider this point.

We come now to a consideration of the Separate Representation of Voters case, [1952] 2 A.D. 428. The Separate Representation of Voters Act, 1951, provides for the separate representation of European and non-European voters in the Province of the Cape of Good Hope. By " non-European " is meant :

> a person who is not a white person and who is not a Native for the purposes of the Representation of Natives Act, 1936.

By " white person " is meant :

> a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a non-European.

Within the limits of the proviso to the definition of " white person ", " passing ", as understood in the United States, is apparently tolerated by the Act. This Act was passed by the House of Assembly and the Senate sitting separately, and did not conform to the procedure set out in ss. 35 and 152 of the Constitution. It was argued that the Act, by debarring non-Europeans who before the Act were entitled to vote in the same constituencies as white persons, came within s. 35. From the date the Act came into operation, non-Europeans could vote only in a separate non-European constituency in which other non-Europeans were registered.

The argument of counsel for the appellants included the following propositions [3] :

(i) That the Act provides for the disqualification of the appellants from being registered as voters at the election of members of the House of Assembly, by reason of their race or colour only, within the meaning of s. 35 of the South Africa Act, 1909.

(ii) That, had the Act been passed before the Statute of Westminster, 1931, it would have been invalid, not because of the application of the Colonial Laws Validity Act, 1865, but because of the express provisions in the South Africa Act, 1909, itself. At p. 430, the submission on this point is summarized thus :

> Indeed, the South Africa Act, as the particular statute creating the Parliament of the Union, in empowering Parliament to repeal or amend provisions of that Act, has resulted in the Colonial Laws Validity Act having a very limited effect, if any, in relation to the South Africa Act.

The relevance of this submission may not at first be apparent. However, if this submission were accepted by the Court, it would mean that subs. 2 of s. 2 of the Statute of Westminster, 1931, has no bearing on the power of the South African Parliament to amend the entrenched sections of the South Africa Act, 1909.

(iii) That the limitations imposed by ss. 35 and 152 of the South Africa Act, 1909, on the powers of the Parliament of South Africa had not been expressly or impliedly removed by the Statute of Westminster, 1931, and subsequent South African legislation. At p. 432, the submissions on this point are summarized thus :

> The Statute of Westminster added to the powers of the Union Parliament (*a*) a power to make laws repugnant to the law of England or to an Imperial statute, (*b*) a power to amend or repeal a statute of the Imperial Parliament in so far as it was part of the law of the Dominion, (*c*) a power to legislate with extraterritorial effect. The Statute did not in any way deal with or interfere with the rules governing the exercise of the legislative power by the Union Parliament.

(iv) That there is a clear distinction between what Parliament may do by legislation and what the constituent elements must do to legislate. Counsel was here arguing that a " manner and form " provision [4] was not inconsistent with the sovereignty of Parliament, but that Parliament is bound by such a provision until it is repealed in the prescribed manner.

(v) That the decision in the *Ndlwana* case, [1937] A.D. 229, if it supported the proposition that the entrenched sections of the South Africa Act, 1909, were no longer binding on Parliament, was wrong. Counsel for the respondents were content to argue that the passing of the Statute of Westminster, 1931, removed the former restrictions on the legislative competence of the South African Parliament ; that the South Africa Act, 1909, was in no way different from any other Imperial statute ; that the South African Parliament was now sovereign in the same sense as the Parliament at Westminster ; and that, in consequence, the South African Parliament could repeal s. 35 by a simple Act of Parliament. Considerable reliance was placed on the *Ndlwana* case, although, as has been observed, it is by no means clear that the extracts cited formed part of the *ratio decidendi*. On the question whether the decision in the *Ndlwana* case should be overruled, it was contended ([1952] 2 A.D. 428, 446) :

> the principle of *stare decisis* should be more rigidly applied in this, the highest Court in the land, than in all others, and the Court has no right to depart from its own previous decisions unless arrived at on some manifest oversight or misunderstanding, *i.e.*, unless arrived at through something in the nature of a palpable mistake . . .

[3] An adequate summary of the arguments of counsel is contained in the report.

[4] See (1951) 27 NEW ZEALAND LAW JOURNAL, 140, for a fuller discussion of the relationship between the " sovereignty " of Parliament and a law prescribing the " manner and form " of legislation.

(vi) That an inquiry into the question whether the Union Parliament is the sovereign law-making body in the Union is irrelevant. The issues raised by the earlier submissions must first be determined.

Centlivres, C.J., recognized that the appeals raised a constitutional question of the very highest importance, and his judgment occupies twenty-four pages of the report.[5] He said, at p. 449, that the appeals raised the question :

> whether what are known as the entrenched clauses of the South Africa Act are, in view of the passing of the Statute of Westminster, still entrenched or whether Parliament sitting bicamerally is free by a bare majority in each House to amend any section of the Constitution even though such a section may originally have been entrenched.

It is convenient to consider the rather lengthy judgment under the heads of the submissions made on behalf of the appellants.

I. Whether the Act fell within s. 35 of the Constitution.—The learned Chief Justice found little difficulty in disposing of the first issue—namely, whether the Act was one falling within the terms of s. 35. He stated, at p. 455 :

> There is no doubt in my mind that in seeking to do this [to destroy the single register of voters and to create two new registers, one for Europeans and another for non-Europeans], the Act disqualifies both Europeans and non-Europeans from remaining on the register on the ground of their race or colour.

This meant that the Act was one which, if the restrictions imposed by s. 35 on the manner of passing such legislation still bound the Union Parliament, should have been passed by joint sitting of both Houses as provided by that section.

II. The Powers of The Union Parliament before The Statute of Westminster, 1931.—Counsel for the appellants had argued that, even before the Statute of Westminster, 1931, the Union Parliament had full power to amend the South Africa Act, 1909, but, in respect of legislation affecting certain sections of that Act, a special procedure was necessary. He asserted further that the Colonial Laws Validity Act, 1865, which enlarged the legislative competence of " Colonial " Legislatures, had no relevance to the South Africa Act, 1909. The South Africa Act, 1909, contained special provisions for its amendment; the general provisions of the Colonial Laws Validity Act, 1865, therefore, did not apply to an amendment of the South African Constitution.[6]

The learned Chief Justice stated, at p. 460 :

> there was no section of the South Africa Act which could not be repealed or amended by the Union Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the Act.

As to the effect of the Colonial Laws Validity Act, 1865, on the power of the Union Parliament in relation to the Constitution, he observed, at p. 461 :

> I am now in a position to ascertain what effect, if any, the Colonial Laws Validity Act had in respect of the South Africa Act prior to the Statute of Westminster. A repeal or alteration of the South Africa Act enacted by an Act of the Union Parliament in accordance with the provisions of s. 152 would be repugnant to the provisions so repealed or altered. Those provisions are, it is true, contained in a British Act of Parliament *viz.*, the South Africa Act, but that repugnancy is specifically authorized by that very British Act which is a later Act than the Colonial Laws Validity Act and must therefore in case of conflict override the earlier Act. Section 2 of the Colonial Laws Validity Act could therefore have no application to a repeal or an amendment of the South Africa Act.

III. The Effect of The Statute of Westminster.—Counsel for the appellants had submitted that the limitations imposed by the entrenched sections of the South Africa Act, 1909, had not been expressly or impliedly removed by the Statute of Westminster, 1931. He asserted that the South Africa Act, 1909, could be amended only in the manner prescribed in that Act. The learned Chief Justice traversed the events leading up to the enactment of the Statute. At p. 459, he stated that " the Statute of Westminster contains no express repeal of those sections [the entrenched sections] ". On the question of implied repeal, reference was made to the following extract from the judgment of Kotze, A.A.J.A., in *New Modderfontein Gold Mining Co.* v. *Transvaal Provincial Administration*, [1919] A.D. 367, 400 :

> The books tell us that a repeal by implication of an earlier statute by a later one is neither presumed nor favoured. It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one. There are many cases dealing with the principles applicable in the matter of implied repeal. I will refer to one or two of them. *Lord Blackburn* in the House of Lords in dealing with this question made the following apt observations (*River Wear Commissioners* v. *Adamson*, 2 A.C. 743, 763): " In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what the intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used."

In *Harris's* case, [1952] 2 A.D. 428, the learned Chief Justice stated, at p. 463, that s. 2 of the Statute of Westminster, 1931, by providing that the Colonial Laws Validity Act, 1865, shall cease to apply to Dominion legislation, had not, " by mere implication, effected a radical alteration in our Constitution ".[7] The powers of amendment of the Constitution remained unaffected by the Statute of Westminster, 1931. After 1931, the Union Parliament was competent to amend the Constitution sitting either bicamerally or unicamerally. The Status of the Union Act, 1934, enacted by the Union Parliament, was not considered to be relevant.[8]

IV. The Relationship between The Legislative Powers of Parliament and A " Manner and Form " Provision.—It was argued for the appellants that there is a clear distinction between what Parliament may do by legislation and what the constituent elements must do to legislate. Counsel cited in support the opinions expressed by Cowen, Dicey, Dixon, Latham, Jennings, and Salmond.[9] In an article in (1935) *51 Law Quarterly Review*, 590, Dixon, J. (as he then was), suggested

[5] Because the South African reports are not widely available in New Zealand, we have quoted the relevant extracts from the judgment in full.

[6] The relevance of s. 5 of the Colonial Laws Validity Act, 1865, to the powers of the New Zealand General Assembly to amend the New Zealand Constitution Act, 1852, is discussed by Professor R. O. McGechan in *New Zealand and the Statute of Westminster*, 100-103. In so far as New Zealand is concerned, this controversy was ended by the enactment of the New Zealand Constitution Amendment Act, 1947 (U.K.).

[7] A statement to similar effect may be found on p. 464 of the judgment.

[8] [1952] 2 A.D. 428, 468.

[9] The argument on this point is summarized at pp. 430, 431.

that even in the United Kingdom a distinction is to be drawn between the power to make any law and the manner of exercise of that power. Although the United Kingdom Parliament cannot bind its successors, in the sense that it can deny them certain legislative powers, it is contended that Parliament is competent to determine the manner in which legislative power can validly be exercised. The principle that the existing law is supreme and conditions imposed thereby must be complied with to make a valid law is, in the view of Dixon, J., of general application, applying equally to the power of the United Kingdom Parliament and to that of the Dominion Parliaments.[10]

Centlivres, C.J., did not find it necessary to decide on the validity of this submission. The decision on the earlier submissions made this unnecessary.[11]

V. The Decision in The Ndlwana Case.—Centlivres, C.J., observed ([1952] 2 A.D. 428, 452) that the Cape Provincial Division had correctly held that it was bound by the decision in the *Ndlwana* case :

> in which it was decided that, inasmuch as the Union Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union, the Supreme Court has no power to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority.[12]

The learned Judge-President in the lower Court had expressed doubts as to the correctness of the *Ndlwana* decision, but had stated that only the Appellate Division could reconsider that decision. After referring to decisions of South African Courts and of the Judicial Committee on the principle of *stare decisis*, the learned Chief Justice concluded, at p. 454, that the Appellate Division should decline to follow one of its earlier decisions if it was demonstrated that the decision was wrong.

Centlivres, C.J., said, at p. 471, that the decision in the *Ndlwana* case had been given without " argument upon the point whether the Statute of Westminster had any effect upon the entrenched clauses of the South Africa Act ". The fact that the decision was given without consideration of this question deprives the opinion of Stratford, A.C.J., of much of its force. The learned Chief Justice concluded, at pp. 471, 472 :

> It seems to me with great respect that this Court [the Appellate Division in the *Ndlwana* case] *per incuriam* pronounced a decision on a question of vital constitutional importance without hearing argument for and against the main conclusion at which it arrived. Even if it did hear any argument on this vital question, that argument lasted a very short time. The records of this Court show that counsel for the appellant argued from 10.5 a.m. to 11 a.m., that counsel for the respondent argued from 11 a.m. to 11.15 a.m. and that counsel for the appellant replied from 11.15 a.m. to 11.25 a.m. (This short argument contrasts strangely with the argument in this case which lasted six days.) The Court then adjourned for thirty-five minutes and on reassembling at noon announced that the appeal was dismissed and that reasons would be handed in later.
>
> I have carefully examined the record which was before this Court when it heard *Ndlwana's* case and it is clear that there was not placed before this Court on that occasion the mass of material which counsel on both sides placed before this Court in the present case.
>
> The decision in *Ndlwana's* case did not lead to the coming into existence of any rights accruing to, or obligations devolving on, private individuals. That decision, if correct, enabled Parliament to deprive by a bare majority in each House sitting separately individuals of rights which were solemnly safeguarded in the Constitution of the country. This is a potent reason why this Court, on being satisfied that its previous decision was wrong, should not hesitate in declaring the error of that decision.

VI. The Sovereignty of The Union Parliament.—Counsel for the appellants had submitted that a decision based on the " sovereignty " of the Union Parliament could not be given without consideration of the earlier submissions. Counsel for the first respondent, at pp. 463, 464, had contended :

> no country which, like the Union, emerged from a Colony into a Dominion within the framework of the British Constitution can be a sovereign State unless it has a sovereign Parliament functioning bicamerally in the same manner as the British Parliament and . . . if this is not so in the case of the Union, it cannot be a sovereign State unless it breaks completely with its past and abolishes the monarchy.

The learned Chief Justice rejected this contention. He said, at p. 464 :

> It seems to me to be based on the fallacy that a Dominion Parliament must necessarily be a replica of the British Parliament despite the fact that all Dominion Parliaments have constitutions which define the manner in which they must function as legislative bodies. There is nothing in the Statute of Westminster which in any way suggests that a Dominion Parliament should be regarded as if it were in the same position as the British Parliament . . .
>
> A State can be unquestionably sovereign although it has no Legislature which is completely sovereign. As Bryce points out in his *2 Studies in History and Jurisprudence*, 53 (1901 Ed.), legal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under s. 63 and the proviso to s. 152. Such a division of legislative powers is no derogation from the sovereignty of the Union and the mere fact that that division was enacted in a British statute (*viz.*, the South Africa Act) which is still in force in the Union cannot affect the question in issue.

The learned Chief Justice concluded, at p. 468, that " the Union is an autonomous State in no way subordinate to any other country in the world ". We have assumed that by this statement Centlivres, C.J., wished to assert that only the Union Parliament could legislate in respect of South Africa. " Parliament " means both Houses sitting bicamerally or unicamerally in accordance with the South Africa Act, 1909.

In summary form, it may be stated that the decision in the Separate Representation of Voters case established these principles :

(i) That, before the enactment of the Statute of Westminster, 1931, the Parliament of South Africa had full power to amend the South Africa Act, 1909, provided that in relation to certain questions it followed the procedure set out in ss. 35, 137, and 152.

(ii) That the Statute of Westminster, 1931, did not affect the power of the South African Parliament to amend or repeal the South Africa Act, 1909.

(iii) That the Status of the Union Act, 1934, is irrelevant in any consideration of the power of the Union Parliament to amend the South Africa Act, 1909.

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[10] This argument is more fully developed in (1951) 27 NEW ZEALAND LAW JOURNAL, 140.

[11] The validity of the views put forward in (1951) 27 NEW ZEALAND LAW JOURNAL, 140, relative to the effect of a " manner and form " provision is not weakened by the decision in the Separate Representation of Voters case. In fact, the decision that " Parliament " may mean Parliament sitting bicamerally or unicamerally, according to the subject-matter of the legislation, tends to support the view there expressed.

[12] This statement seems to suggest that the learned Chief Justice accepted the remarks of Stratford, A.C.J. (cited *supra*), as part of the *ratio decidendi* in that case.

(iv) That the Union Parliament is a sovereign Legislature, but " Parliament " means, according to the subject-matter of the legislation, Parliament sitting either unicamerally or bicamerally in accordance with the South Africa Act, 1909.

The South African Government has criticized the decision principally on the ground that the Appellate Division had departed from its earlier decision in the *Ndlwana* case. It has been demonstrated that it is not at all clear that the decision in the later case runs contrary to the *ratio decidendi* in the *Ndlwana* case However, even if it does, the Appellate Division had ample reason for departing from the earlier decision. For the time being, the decision in the Separate Representation of Voters case is final, but the South African Parliament has recently passed an Act to permit appeals on constitutional issues from the Appellate Division. The purpose of the proposed legislation is clear : the Government wish to annul an inconvenient and unpalatable decision. Their action affords a most unfortunate precedent.

THE WEIR CASE.

Otago Law Society's Statement.

At a meeting of the Council of the Otago District Law Society, held on August 7, it was resolved that the following statement be sent to the NEW ZEALAND LAW JOURNAL :

" The Council of The Otago District Law Society after consideration of the article by Mr. J. C. Parcell in the issue of the NEW ZEALAND LAW JOURNAL of January 22, 1952, intituled " Confessions—A Warning Light ", the terms of the reference to the Commission to inquire and report on the circumstances of the prosecution of Danielle Sylvia Joan Weir, and the finding of the Commission, makes the following statement :

(1) That members of the legal profession owe to the community a special duty of vigilance in drawing attention to any apparent miscarriage of justice, and, further, are entitled to express freely their views on the administration of the law and any trend or change in the law which, in their opinion, might be objectionable, and, in particular, which might interfere with the liberties of the subject ; and that this is particularly so when the publication chosen is suitable for the discussion of such problems.

(2) That the article referred to was written in proper discharge of that duty by a senior practitioner in the district in which the proceedings were taken. The conviction in the Weir case was used as an illustration of what the writer considered to be an inherent danger in the present law of evidence, and the article concludes with a constructive suggestion as to the alteration of the law for the protection of persons under the age of twenty-one years.

(3) That, in the opinion of this Society, the criticism by the Commission of Mr. Parcell, and in particular the finding " On evidence before me the article in the LAW JOURNAL was unjustified ", went beyond the terms of the reference and was unwarranted ; and, further, that Mr. Parcell's action is to be commended, and was entirely consistent with his duty."

A copy of this statement has been forwarded to the Hon. the Minister of Justice and to Mr. Parcell.

OBITUARY.

Mr. Oliver Nicholson (Auckland).

The late Mr. Oliver Nicholson, who died on July 29, was admitted to practice in March, 1886 ; and he was consequently Auckland's senior practitioner. He was eighty-eight years of age and had worked a full day at his office four days before he died.

Born in Mangonui, North Auckland, then a busy milling town, Mr. Nicholson was educated at the Auckland Grammar School, and subsequently entered the office of Mr. A. E. Mackechnie, an Auckland barrister and solicitor, where he qualified. After Mr. Mackechnie's death, he went into partnership with Mr. G. A. Gribbin, and later his son, Mr. C. F. Nicholson, and his son-in-law, Mr. H. M. Rogerson, joined the firm.

At times, Mr. Nicholson was chairman of the Bank of New Zealand, chairman of directors of the New Zealand Insurance Co., and president of the Auckland Savings Bank. At the time of his death, he was on the directorates of the New Zealand Insurance Co., the Auckland Meat Co., Phillipps and Impey, Ltd., and Hancock and Co., Ltd., and was a trustee of the Savings Bank.

Chairman of the old Mount Eden Road Board, he became Mount Eden's first Mayor when the borough was formed in 1906, and retained the office until 1918. He was also chairman of the Auckland City Sinking Fund Commissioners and the Auckland Transport Board Sinking Fund Commission and a member of the Auckland Drainage Board Sinking Fund Commissioners.

He was a keen racing man and bowler, and for a period was president of the Auckland Racing Club and president of the Mount Eden Bowling Club.

Nearly sixty years ago, Mr. Nicholson became a member of the Masonic Order, and assumed his first office in the Grand Lodge, New Zealand Constitution, in 1900, when he was appointed Grand Registrar. In 1902, he became Senior Grand Warden, and, in 1904, Grand Superintendent of the Auckland District. He was pro-Grand Master of New Zealand in 1908, and was installed Grand Master in 1916, an office he held for two years.

In his time, he installed six New Zealand Grand Masters, including Viscount Bledisloe, former Governor-General, Mr. W. F. Massey, a former Prime Minister, and Sir Alexander Herdman, a former Supreme Court Judge. He also installed 1,370 Masters and opened fifty-one new lodges up to the time of his golden jubilee in 1944.

For forty years he was Provincial Grand Master of the Auckland District, an office he relinquished in 1945, when he retired from active office in the Lodge. He was more particularly interested in works initiated by his Lodge, and was one of the prime movers behind the Papakura Masonic Boys' Home. He was its management committee's first chairman. He organized the building of the Masonic Temple in St. Benedict's Street, and was its first chairman of directors.

Mr. Nicholson, whose wife died many years ago, is survived by four children (Mrs. H. M. Rogerson, Mr. C. F. Nicholson, Mrs. L. M. Nathan, and Mr. A. B. Nicholson), twelve grandchildren, and eleven great-grandchildren.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Child Witness.—"Do you know what it is to tell the truth ?" asked Crown counsel of a child of six at the Wellington Sessions in an indecency case. After some hesitation, she replied that she did not, whereupon Cooke, J., directed the jury to find a verdict of "not guilty". "What you have just seen sometimes happens in the difficult work the law has to perform," he said. At a recent meeting of the Magistrates' Association, Mr. Basil Henriques, who has had a great deal of experience of the London juvenile Courts, put forward the suggestion that, when children give evidence, they should be permitted to affirm instead of taking the oath. His contention was based upon the belief that an increasing number of children are brought up with no knowledge of God. Instead of the oath, he expressed a preference for the Chinese form, which requires that a candle be blown out, the child saying: "May I be puffed out in the same way as this candle is, if I tell any lies." The position is not without its difficulties. There is the incident of the Judge who, seeking to test the veracity of a little girl, put the question much as Cooke, J., did. "Do you know what will happen to you if you don't speak the truth ?" "Yes," she replied, "my expenses won't be paid to me."

Breach of Promise.—Some confirmation of the belief that this is a woman's world is provided by *Baskerville* v. *O'Grady*, decided by Lynskey, J., a few months ago. This was an action for damages for breach of promise to marry. In 1945, the plaintiff had gone through a ceremony of marriage with the defendant, and had borne his child the following year. She sued for a divorce in 1949, but he defended, and swore during the hearing that he was a widower, although he knew that his real wife whom he had married in 1916 was still alive. The petition was dismissed, whereupon the plaintiff continued to live with him until 1951, when she found out about the existence of his wife. She then left him, and later commenced her action. The jury awarded her £2,700 damages, upon the basis of a direction that, if a man in the position of the defendant went through a ceremony of marriage that was of no legal effect, this was not a fulfilment of his promise, and the woman was entitled to damages for the breach. They were told that, upon the evidence, her material loss did not appear to be very great, the rights of the child being provided for in other ways; but that they could take into account the injury to her affections, prejudice to her future life and prospects of marriage, the rank and condition of the parties, the defendant's means, and other relevant matters—indeed, that they would add a sum by way of punishment to mark their displeasure at the defendant's conduct. It was said that she had lost the status of marriage (for, when the marriage broke down, she was left without the rights of a married woman), and that this might be a real loss, since she could get neither maintenance under a separation order nor alimony on a divorce. This seems to Scriblex rather illogical. She could hardly be said to be deprived of rights to maintenance or alimony, since she was never entitled to them, even if disappointed in her expectation. It all goes to show that married men, hungering for pastures new, should never sow therein the seeds of illusory marital promises.

Rulings.—In conformity with previous practice in Australia, the following rulings of the English Bar Council which appear in its last Annual Statement will be adopted in the various States as indicative of the proper standard to be followed by barristers there: (i) Civil servants in whole time employment should not practise at the Bar. (Some twenty years ago, the Bar Council ruled that there was no objection to the paid legal adviser to a Ministry continuing to practise in the Privy Council, but this ruling is now cancelled.) (ii) It is undesirable for a practising barrister, having advised a client professionally in regard to his position as a shareholder of a company, to accept an offer to become a director of that company in order to assist in the investigation of the company's affairs and also to advise on questions of law which may arise. (iii) A Queen's Counsel ought not to appear as an advocate in any Court of law without a junior, and for the purpose of this ruling the expression "Court of law" includes a court martial, Lands Tribunal, and Transport Tribunal, but does not include a Ministerial or local government inquiry. In New Zealand, the last of the three rulings is of great practical importance, since the opportunity to appear as junior to a Q.C. serves as a most useful part of the training of the young barrister.

The Wife's Rights.—It was a proposition unacceptable to the Court that a bruise or a black eye did not amount to danger to life, limb or health and it was open to a jury to find that kicks, cuts and blows, if provable, amounted to cruelty and most people would so regard them: per Singleton, L.J., in *Fromhold* v. *Fromhold*.

Where a wife obtained a decree absolute on November 21, 1951, and on November 26, 1951, married a second husband who died two days later, it was held that what she had secured on her remarriage was a fresh right to support and that the remarriage was no bar to an application for permanent maintenance from her first husband: per Asquith, L.J., in *Snelling* v. *Snelling*, [1952] 2 All E.R. 196.

A husband having deserted his wife and three children and left them in the matrimonial home of which he owned the freehold, it was held that the Court had jurisdiction under the Married Women's Property Act, 1882, to order that she and the children should be permitted to reside in the house until the husband provided suitable alternative accommodation for them and that he should "take no step by sale or assignment of any right title or interest which he now has in the said property or by any other act whatsoever create any right title or interest in any other person to evict his wife and children or any of them from the matrimonial home or in any way interfere with their residence therein": *Lee* v. *Lee*, [1952] 1 All E.R. 1299.

The position of a wife in the matrimonial home is that of a licensee with a special right under which her husband cannot turn her out except by order of the Court; and, where a husband deserts his wife and leaves her and the children in the matrimonial home and subsequently becomes bankrupt, the property passes to the trustee in bankruptcy, subject to the clog or fetter that the wife cannot be ejected from the property: per Denning, L.J., in *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307.

LET'S ALL BE FARMERS.

By Advocatus Ruralis.

This week, Advocatus had lunch with the Oldest Practitioner and a farmer friend. The conversation turned to the proposed Land Bill, which forbids transfers to non-resident owners, without the permission of a Minister.

The Oldest Practitioner commented that in Norman times this sort of restriction was put on the land-worker, who, if necessary, was branded to keep him to his land. The Oldest Practitioner also pointed out that it was merely an extension of the system which prevailed in one of the commercial towns in Australia, where a worker was not allowed by the unions to work for the leading employer until the worker had lived three years in the town. The system had reached New Zealand, of course, through the wharves, with their closed unions. The position was not unlike the Persian oil dispute, where the Persian Government had decided to follow England's lead and nationalize the fuel industry.

Advocatus was intrigued at the curious point of view that farms could be financed and managed by farmers alone. A leading American industrialist has stated that only 2 per cent. of the community are fit to run their own businesses and only another 8 per cent. are fit to act as second in command. The industrialist had obviously not met our New Zealand farmers. The Oldest Practitioner remarked that, when the first settlers went to the Wairarapa, one group, consisting of Vavasour, Weld, and Clifford, left one of their number in business in Wellington, so as to help finance the farm. The Wairarapa had been particularly fortunate in its non-resident farmers. Leading farmers send their sons to Lagoon Hills, a non-resident farm to learn the best methods of farming. A leading breeder of Jerseys at Tuhitarata has never lived on his farm. The non-resident owner of Muttonhole Mains has set an example of farming his various properties that good farmers are pleased to copy.

On the Fernridge some twenty-five years ago, a garage manager bought a small farm which the resident farmer had neglected. The garage manager had to keep on working at his garage in order to make the farm pay, but to-day it is a prosperous self-contained stud sheep farm. Should this Bill become law, he could only get this land with the permission of the appropriate Minister, who, as in 1942, might delegate the granting of permission to a Farmers' Union or to some trade union secretary.

Advocatus thought it was a pity that farms should be placed in the same position as Maori lands, which can be sold to Maoris only. The Maori lands were protected to give the Maoris time to adjust themselves to changing conditions. The farmer has had his period of protection.

In the 1920's, he paid no income-tax. In the 1930's, he had his debts wiped off. In the 1940's, he was hedged round with all sorts of protection. In the 1950's, he made such a tremendous income that special legislation was passed to protect him from the Income Tax Department. Surely he should now be able to stand on his own feet.

Advocatus said that there was a time when a man had to work to make good. If he did not work, and keep on working, he lost his job or his business or his farm. This system has not yet been proved to be wrong. Should this restrictive legislation go through, what will be the position of a mortgagee with a lazy farmer? It is possible that mortgagees will insist that all farm mortgages be placed either on a black list or on an amortization basis, because, when there is a depression, there will be no farmer buyers, and no others will be allowed.

Of course, the Government might be prepared to guarantee the mortgagee against loss as the result of this legislation.

LEGAL LITERATURE.

Law of Road Traffic in New Zealand.

Chalmers and Dixon's Road Traffic Laws of New Zealand, 2nd Ed. By R. T. Dixon. Pp. xxiii + 513 (incl. Index). Wellington: Butterworth and Co. (Aust.), Ltd. Price 82s. 6d., post free.

The Transport Act, 1949, not only consolidated the whole of the statutory provisions relating to road traffic and road transport, but it also made considerable amendments in the existing law. Mr. Dixon, who was one of the authors of the first edition of this work, is Solicitor to the Transport Department. He is consequently well fitted to undertake the onerous task of bringing out in one volume a well-annotated statute and a collection of Regulations forming part of our transport and traffic legislation. The law, as stated, is as at January 1, 1952, with the exception that the included English and overseas cases are complete to the end of all reports available in New Zealand as on that date.

Mr. Dixon has made an exhaustive study of the law of transport, and his annotation of the Transport Act, 1949, and the various Regulations should prove of great value to all whose work brings them to consider the multifarious provisions affecting motor-vehicles and other vehicles operating on our roads which make up our current law on the subject. He has also brought together the various ramifications of subject-matter appearing in his work in a comprehensive general index, which appears to be very usefully compiled and conducive to easy reference. Use of the work is extended by the inclusion in a series of appendices of a speed table, a general summary of the law of negligence with special reference to negligent driving, and a reprint of the agreement relating to "hit and run" drivers in connection with third-party insurance. Mr. Dixon is to be congratulated on his effective arrangement of his subject-matter and on the completeness of his text.