[TUESDAY, NOVEMBER 24, 1925.

Butterworth's Fortnightly Notes

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Butterworth's Fortnightly Notes.

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempted from her power."

—Richard Hooker.

The Editor will be pleased to receive manuscripts of Articles for consideration and any suggestions with regard to the development of the Paper.

Address all communications:—The Editor,
Butterworth's Fortnightly Notes,
49-51 Ballance Street, Wellington.

TUESDAY, NOVEMBER 24, 1925.

COURT OF APPEAL.

Stout, C.J.
Sim, J.
Adams, J.
Ostler, J.

October 7, 20, 1925.

IN RE BUICK SALES LTD. IN LIQUIDATION: JONES v. OFFICIAL LIQUIDATOR.

Company—Income tax—Misfeasance—Penal income tax—No loss to company—Effect of this—Sec. 254—Meaning of classes of misfeasance claims.

Buick Sales Limited was incorporated in May 1918 as a private company to acquire from Jones and Aker the motor business then being carried on under the style of Buick Sales Company. Jones bought Aker's shares in the company in June 1919 and thereafter was the registered holder of the whole of the shares in Buick Sales Limited except ten which were in the name of one, Anderson. In August 1922, the Commissioner of Taxes, on the ground that the company had rendered false returns to the Income Tax Department, made an assessment against the company for a large sum for extra tax and penalties. The company appealed from the assessment in February 1923 and on 25th June 1923 the Magistrate disallowed some items but sustained the assessment for sums aggregating £4683 for penal tax in respect of four years' returns. On 11th July 1922 the company, being indebted to its banker on current account, issued and delivered to the bank two debentures for £7500 each, charging its undertaking and all its property (except land or any interest therein) with the payment of the principal and interest payable under the debentures. The conditions of the debentures included power to appoint a receiver on default, with the usual powers, including power to sell or concur in selling any of the property charged as a whole as a going concern or in parcels. The company's business not prospering, the bank called up its overdraft and on 27th April 1923 appointed a receiver who took possession of the business of the company for the bank as holder of the debentures. At that time there appears to have been about £18,000 due by the company to the bank. The receiver endeavoured unsuccessfully to sell the company's business, and ultimately in August 1923 Blackwell Motors Limited was incorporated with the view of purchasing and did purchase from the receiver all the stock-in-trade, plant, book debts, business, choses in action and other assets of the company. The contract of sale defines "choses in action" as including any misfeasance claims which Buick Sales Limited or its liquidators might have against the directors. If such claims are property of the company they would be included in "assets." An order for the winding up of the Buick Sales Limited was made in March 1924, seven months after the sale to Blackwell Motors Limited, and on 28th August 1924 a summons under Section 254 of the Companies Act was issued by the liquidator calling upon Charles James Jones, as a director of the company, to show cause why an order under that section should not be made against him in respect of alleged acts of misfeasance described as follows:—

		£	s.	d.
1.	Penal Income Tax	4683	11	7
2.	Balance due on "Farm Account"	4120	14	10
3.	Balance due on "Private Account"	2779	11	0
4.	Amount paid Aker part purchase money of shares wrongly debited to "Merchandise Account"	721	4	5
5.	Dividends paid out of capital ..	2047	9	6
		£14,352	11	4

When the summons came on for hearing it was held that the purported assignment of misfeasance claims was void, on the ground that such claims were bare rights of action and not assignable. Jones appealed from that decision.

Myers K.C. and **Gresson** for appellant.
Donnelly for respondent.

ADAMS J. delivered the judgment of the Court in which he said: Counsel for the appellant submits that the claim in respect of penal income tax must be disregarded in any event as it is not shown that any loss has resulted to the company. It was decided in **Coventry & Dixon's** case 14 C.D. 660 on appeal from Jessel M.R. and in **Liverpool Household Stores Association** 59 L.J. Ch. 616 that, to make a person liable under the misfeasance section, he must be shown to have been guilty of some misconduct by which the company has suffered loss. There must be actual loss or damage measurable in terms of money. There is nothing from which it can be concluded that the furnishing of inaccurate income tax returns has resulted or will result in loss to the company. In respect of this item therefore, there can be no claim under the section. As to the remaining four causes of claim it is important to observe that, while it is usual to refer to all claims coming within section 254 as "misfeasance claims", there are in fact two distinct classes of acts or defaults dealt with in the section. The first class is described thus: "Where . . . it appears that any . . . director . . . has misapplied or retained, or has become liable or accountable for, any moneys or other assets of the company." The second class relates to "misfeasance or breach of trust." Lord Justice Bramwell points out this distinction in Coventry & Dixon's case (supra p. 672, 673), and also points out that all the causes of claim under the first part are causes of claim which would have been enforceable in Courts of Law independently of the section. Now each of the four causes of claim to which we are now referring comes within the first class; each relates to the misapplication or retention of moneys of the company; and in each case the claim of the company at the time of the sale to Blackwell Motors Limited was enforceable by the company by action in a Court of Law.

On the question of whether these claims are covered by debenture the learned Judge said: "In our opinion the law is correctly stated by Vaughan Williams L.J. in **In re Anglo-Austrian Printing Union** 1895 2 Ch. 891 and is in accordance with justice and right. We fail to see why the security of the debenture holders of a company should depend upon the question whether the form of the assets charged had been changed by some wrongful act of the company's directors, or why moneys recovered from the directors or officers for misfeasance causing loss to the company, which in most cases would diminish the security of the debenture holders, should not be subject to that security, but should be handed over to the unsecured creditors. To shew the injustice which might result from the application of this doctrine it is only necessary to point out that the applicant in this case alleges that, apart from the claim for penal income tax, the other four claims amount in the aggregate to more than twice the total capital of the company."

After reviewing a number of the decisions submitted the learned Judge concluded as follows: We have not thought it necessary to refer to the other authorities and passages from text writers of recognised authority which were cited in the argument, preferring to decide the questions raised on the basis of the right of the company and of the receiver under his powers to sell and assign those claims as part of the assignable property of Buick Sales Limited. And while our decision is confined to the specified claims of the company against Jones, we have not lost sight of the fact that, in the authorities and text books cited to us, including **In re Anglo-Austrian Printing Union** (1895) 2 Ch. 691 the statements that misfeasance claims may be sold by the liquidator of a company, and will pass under the floating charge created by a debenture, and that on realisation the proceeds are subject to the debenture security, are made in general terms and are treated as applicable to all claims enforceable under the misfeasance action of the

Companies Act. They do not, however, go so far as to say that a receiver for debenture holders may himself sell all such claims and assign them to the purchaser. We wish also to add that the case was more fully argued before us than in the Supreme Court. The order made in the Supreme Court wil be set aside and an order will be made dismissing the summons. The liquidator of Buick Sales Limited must pay the costs of this appeal on the highest scale as from a distance.

Solicitors for appellant: **Wynn Williams, Brown & Gresson,** Christchurch.

Solicitors for respondent: **Raymond, Stringer, Hamilton & Donnelly**, Christchurch.

Stout, C.J.
Sim, J.
Reed, J.
Adams, J.
Ostler, J.

October 14, 23,1925.

TE POROU HIRAWANU v. GARDNER.

Lease—Lessee's covenant to keep in repair etc.—Lessee's covenant to cultivate manage and use in husbandlike manner and to keep free from noxious weeds—Whether entitled to cut standing timber.

Defendant was lessee of a block of Native land. The plaintiff and six others were owners in fee. One Bell was original lessee and defendant became registered proprietor of lease in August, 1921. The term was for 42 years and the lease contained a covenant by the lessee to repair and keep in good and tenantable repair and condition the said land and all improvements for the time being thereon. It also contained a covenant by the lessee to cultivate manage and use the land in a husbandlike manner and to keep the same free and clear of noxious weeds and comply with the provisions of the Noxious Weeds Act, 1908, or any amendment thereof to which an occupier was liable. At the date of the grant of the lease the land had not been cultivated or improved in any way. The block contained 227 acres and of these 41 acres were covered with timber trees. The defendant caused all the timber trees to be cut down and sold. The plaintiffs sued for damages for the destruction of the trees. The evidence was taken and the case removed to the Court of Appeal for argument.

G. P. Finlay and **Simpson** for plaintiffs.
Hampson and **Marsack** for defendant.

THE COURT, Ostler J. dissenting, held that the defendant was liable. Ostler J. found that the case was indistinguishable from **In re Rotoiti No. 5 Block** (1923 N.Z.L.R. 619.

SIM J. who delivered the judgment of REED and ADAMS JJ. as well as for himself said: The case raises two questions for determination. The first is whether or not under such a lease the tenant has the right, for the purpose of obtaining the profitable enjoyment of the land, to cut and sell timber trees growing on the land. If he has such a right, the second question is whether or not what was done by the defendant in the present case can be treated as having been done in exercise of that right. In the case of **In re Rotoiti No. 5 Block** (1923) N.Z.L.R. 619 a similar lease was under consideration, and it was there held by Mr. Justice Hosking that the tenant had an implied right to cut or destroy the bush on the land in order to obtain in a reasonable way the profitable enjoyment of the land, and that in lieu of burning or destroying the timber he might save it and sell it for his own benefit. The defendant relied on this case as an authority in her favour. The facts of the present case are not so strong as they were in that case in favour of a grant by implication of the right to cut and sell the timber. It might have been possible, however, to establish such a grant in a case such as the present if it were clear that the cutting of the timber had been done bona fide for the purpose of securing the profitable enjoyment of the land, and was reasonably necessary for such purpose. The evidence makes it clear, we think, that the cutting of the timber was not done for any such purpose, but for the purpose of making an immediate profit out of the timber. It was done without any regard to the improvement of the land, and without any idea of making it suitable for use as a farm by the defendant or any one else. David Gardner, the brother of the defendant, appears to have managed the property for her and when giving evidence he spoke of the property as if he were the owner of it. The lease was bought, he said, in August 1920, and the object of taking the lease was as a farming proposition. An application was made to buy the freehold of the block at the end of 1921 or beginning of 1922. That application was refused, and Gardner, as he said, decided then to quit the property. About the end of 1922 or the beginning of 1923 he sold to Broadbelt & Co., of Taumarunui, the right to cut the timber on the land, the consideration being the delivery of sawn timber to the value of £600. The timber was all cut by the end of October 1923, and some time before the end of that year Gardner sold the lease for £700. From first to last nothing whatever was done in the way of effecting improvements on the land, and no stock was ever put on the land. It seems to us that to deal as the defendant did with the timber was a breach of her covenant to manage and use the land in a husbandlike manner. In the circumstances it is impossible, we think, to imply any grant to her of the right to cut and sell the timber on the land. In the absence of any such grant, the property in the timber when cut vested immediately in the person entitled to the first estate of inheritance in fee or in tail. **Leake on Uses and Profits of Land**, p. 37; **Honywood v. Honywood**, L.R. 18 Eq. 306, 311. The plaintiff and his co-tenants are the owners in fee of the reversion, and they are entitled to recover the proceeds of sale as money received to their use. It appears from the evidence of Mr. Gardner that the defendant was credited in the books of his firm with the sum of £600 as the proceeds of the sawn timber received from Broadbelt, and that is the amount which the owners are entitled, we think, to recover from the defendant. The plaintiff is entitled to recover from the defendant only his own share of the damages: **Wilkinson v. Haygarth**, 12 Q.B. 837; and the other owners will have to be joined as plaintiffs before judgment can be given for the full amount. The case ought to be remitted to the Supreme Court so that the other six owners may be joined as plaintiffs. When that has been done judgment should be entered in favour of the plaintiffs for £600 with costs according to scale and disbursements and witnesses' expenses to be fixed by the Registrar at Hamilton with an allowance of £15 15s for the extra day occupied by the argument in this Court.

Solicitors for plaintiff: **Simpson & Bate**, Taumarunui.
Solicitors for defendant: **Harris & Marsack**, Taumarunui.

Stout, C.J.
Sim, J.
Reed, J.
Adams, J.
Ostler, J.

October 15, 16, 20, 1925.

OFFICIAL ASSIGNEE OF ESTATE OF BOWEN v. WATT AND LOWRY.

Native land—Contract to acquire—Contravening Secs. 176 and 203—Effect of—Whether illegal—Whether contract void—Secs. 205 of Act of 1909 Sec. 7 of Amendment Act of 1912 and Sec. 72 (2) of the Amendment Act of 1913—Combined effect of these sections.

The facts of this action are immaterial for the purpose of the note. The question decided was whether a contract was illegal and void as being in contravention of Secs. 193 to 206 of the Native Land Act 1909 as amended by Secs. 6 and 7 of the Amendment Act 1912 and Secs. 72 and 74 of the Amendment Act of 1913.

Myers K.C. and **Buxton** for plaintiff.
Gray K.C. and **Sladden** for defendant.

THE COURT held that the contract was illegal but not void. We take the following extract from Adams J.: In my opinion the combined effect of Section 205 of the Native Land Act 1909, Section 7 of the Amendment Act 1912 and Section 72 (2) of the Amendment Act 1913, is to render liable to indictment a person wilfully acquiring Native Freehold Land, the area of which, together with the area of all other land held by him as beneficial owner, lessee, or sublessee exceeds the maximum area and to render any interest in freehold knowingly acquired contrary to the provisions of Part XII of the Native Land Act 1909 liable to forfeiture at the suit of His Majesty; but that the validity of the alienation under which the Native Land is so acquired is not affected by the breach of Sub-section (2) of Section 72. It is no doubt difficult to understand why the Legislature should in one section enact that it should be unlawful for any person to acquire property by alienation under the Act, and then in a following section to enact that no such alienation should be invalid because of any breach of that prohibition, but effect must be given to all three sections and there does not appear to be any warrant for restricting the first part of Section 205 to cases where the breach was not wilful. **Lewis v. Bright and Another** 4 E. & B. 917; 119 E.R. 341 does not assist the plaintiff. The decision there was on Sections 29 and 31 of 1 and 2 Victoria c. 106 which enacted that it should not be lawful for "spiritual persons" to engage in or carry on any trade or dealing for gain or profit. It was however expressly provided in Section 31 that no contract should be deemed to be void by reason only of the same

having been entered into by a spiritual person trading or dealing contrary to the provisions of the Act, but that every such contract might be enforced by or against such spiritual person . . . in the same way as if no spiritual person had been a party to it. Counsel for the plaintiff pointed out that the statute had been passed to correct the severity of an earlier statute (57 G. 3 c. 99) which had been held in **Hall v. Franklin** 3 M. & W. 259 to apply to an indorsement of a cheque to a bank in which spiritual persons were partners. Counsel for defendants urged that the proviso to Section 31 should be construed as applicable only where the party sued did not know of the circumstances producing the illegality, but that construction was rejected by the Court. Lord Campbell C.J. said "the action is given to both parties whether there be knowledge or not." So in this case the suggestion that Section 205 should be construed as applicable only to cases where there has been no wilful breach, must be rejected. The result is in the present case that, up to the date on which the plaintiff disclaimed the contract under Sub-section (3) of Section 84 of the Bankruptcy Act 1908, the contract between the debtor Bowen and the defendants remained valid and enforceable, subject to any right of rescission which Bowen and the plaintiff as assignee of his property might have had. I am strongly inclined to the view that there was a good ground for rescission on account of misrepresentation, but by the express terms of Sub-section (3) of Section 84 of the disclaimer effectually determined all the rights, interests, and liabilities of the estate in the bankruptcy in respect of the contract, and the right of rescission is therefore no longer available. The contract being valid, the defendants were entitled to payment of the £4000 on the date fixed by the contract. There was therefore no available defence to the action for that sum, and the mortgage, being given to secure the amount of the judgment entered, was unimpeachable. Upon the disclaimer the defendants, under Section 84 Sub-section (12) of the Bankruptcy Act 1908 became entitled to prove for the amount of the injury (if any) inflicted upon them by it. The position therefore is that the contract itself is determined by the act of the plaintiff, and the only right surviving in respect of it is the right of proof. It would be hopeless to contend that the right to rescind was not a right in respect of the contract within Section 84 Sub-section (3). For these reasons I am of opinion that judgment must be entered for the defendants with costs as on a claim for £5000 with allowance of £31/10/- for two extra days and £10/10/- per day for second counsel and disbursements and witnesses' expenses to be fixed by the Registrar.

OSTLER J. in his lengthy judgment said inter alia: Section 193 of the Act of 1909 provided that it shall not be lawful for any person to acquire either as owner lessee or sub-lessee, whether at law or in equity, and land subject to the restrictions on area imposed by that part of the Act, if the land so acquired, together with all other land held by him as beneficial owner lessee or sub-lessee exceeded a certain area. In **In re Kopatuaki Block No. 2** (14 G.L.R. 132) the Court of Appeal held that this section did not prevent the assignment of Native leases. Section 193 was repealed by the Native Land Amendment Act 1913, and Section 72 of that Act, which was to the same effect (except that the area was altered) was substituted, and by Section 74 assignments of lease were included in the contracts made unlawful. It will be seen that Section 72 provides that it shall be unlawful to enter into a contract for the purchase of freehold or leasehold land subject to these restrictions if by the contract the purchaser acquires, counting the land he already holds and the land he acquires under the contract whether all or only some of it is subject to the restrictions, a greater area of land than these restrictions allow. There is no doubt that this contract comes within the words of the Act, and therefore by virtue of this section it was unlawful to enter into this contract. If Section 72 had stood alone, then I think that there could be little doubt that the contract would be void on the ground of its illegality, for the general rule is that where a statute has expressly declared the making of a contract illegal, it is contrary to public policy that it should nevertheless be enforceable, and the Courts will hold that it is void: see **Bisgood v. Henderson's Transvaal Estates** (1908) 1 Ch. 743. "The Court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done." **Cannam v. Bryce** (3 B. & Ald 183), **Bensley v. Bignold** (5 B. & Ald. 341). A fortiori is this the case where, as in this instance, the statute has provided a punishment for the very act of making the contract: see **Leake on Contracts** (6th ed. 517) and cases there cited. See also the judgment of our Court of Appeal in **J. B. McEwan & Co. v. Ashwin** (1906) N.Z.L.R. 1028. The only possible exception to this rule is where the penalty is imposed merely for the purpose of protecting the revenue: see **Smith v. Mawhood** (14 M. and W. 452). But the statute in this case has provided that though the making of such a contract as this is unlawful, and punishable by heavy fine and the liability of forfeiture of the land to the Crown, at the same time the contract itself is valid. Section 205 of the Native Land Act 1909 provides:—

> "No alienation acquisition or disposition of Native Land or of any interest therein shall be invalid because of any breach of the foregoing provisions of this Part of this Act, but every person who wilfully commits aids or abets any breach of those provisions shall be guilty of an indictable offence," etc.

The word "alienation" is defined in the Act so as to include a contract of sale. So that here we have the very unusual case of the Legislature explicitly providing that the making of a contract shall be illegal and punishable, but at the same time providing equally explicitly that that contract if and when made shall be valid. It is a contract which is illegal but not void. This being so, plaintiff's claim must fail, for it is based and can only be based, not on the mere illegality of the contract.

Solicitors for plaintiff: **Sainsbury, Logan & Wood,**
Solicitors for defendants: **Carlile, McLean, Scannel & Wood,** Napier.

Stout, C.J.
Sim, J.
Herdman, J.
MacGregor, J.
Alpers, J.

July 13, October 15, 1925.

MAYOR ET AL OF PALMERSTON NORTH v. CASEY.

Municipal Corporations Act Sec. 335—Public Works Act Sec. 116—Whether local body can insist on payment by person dedicating road of cost of tarring and sanding footpaths and roadways.

This was an appeal from Reed J. and was dismissed by the majority of the Court, Stout C.J. dissenting. In this action the respondent Casey sued the appellant Corporation to recover the sum of £465, being money paid to the appellant by the respondent (under protest) in the following circumstances: The respondent was the owner of a block of land within the Borough of Palmerston North, which he proposed to subdivide into allotments for sale. In order to provide the necessary frontages, it was part of his scheme of subdivision to dedicate a strip of this land as a public road or street. It thus became necessary for him before offering the allotments for sale to comply with two separate statutory provisions, viz., Section 335 of the Municipal Corporations Act, 1920, and Section 116 of the Public Works Act 1908. The respondent accordingly prepared the plan of subdivision required by Section 335 (1), which was duly approved by the appellant. At the same time the respondent appears to have submitted to the appellant for its approval in terms of Section 116 of the Public Works Act, a plan of the new road or street intersecting the allotments, along with a specification of the proposed roadway, footpaths, kerbing, channelling and concrete culverts. This plan was also approved by the appellant "in accordance with the present existing conditions relating to the construction of **private** streets." These conditions are set out at length in the appellant's Borough By-law No. 1, Clause 90 of which lays down the conditions which must be observed by any person desiring to construct private streets within the Borough. One of these conditions comprises the tarring and sanding of the footpaths and roadways to the complete satisfaction of the Palmerston North Borough Engineer. After both approvals had been thus obtained by him, the respondent proceeded to form and metal the new street as provided for by his plans and specifications, but did not tar or sand either the roadway or footpaths. He next executed the Instrument of Dedication necessary to dedicate this street as a public street in terms of Section 116 (3) of the Public Works Act, which he forwarded to the appellant for its consent thereto. Before consenting to this Instrument of Dedication the appellant required the respondent to deposit with it in connection with the new road the sum of £465 to cover the cost of tarring and sanding the roadway (£330) and footpaths (£135). The respondent's solicitors objected to this requirement, as being beyond the legal powers of the appellant. Eventually in order to enable the Instrument of Dedication. The money so deposited was accompanied by a letter its seal to the effect that "all the requirements of Section 116 of the Public Works Act, 1908, have been complied with," after the respondent had deposited with the appellant as required the sum of £465 to cover the future cost of tarring and sanding the roadway and footpaths in ques-

tion. The money so deposited was accompanied b ya letter from respondent's solicitors, in which they stated that it was paid by Mr. Casey "under protest to the extent of the £465 before mentioned, and to be refunded or properly adjusted in the event of the Council agreeing, or it being judicially decided, that the Council is not entitled to insist upon Mr. Casey tarring and sanding the footpaths and roadway, or either of them." The Town Clerk's letter in reply agreed to these conditions of the deposit, and added that the Council would seek legal advice as to its powers in the matter. The required sum of £465 was paid over in December, 1924, and no part of it has been refunded. The respondent accordingly sued the appellant in the Supreme Court at Palmerston North to recover the amount so paid or deposited. Judgment was given by Reed J. in the action on 9th June last in favour of the respondent Casey, and this appeal was forthwith lodged against his judicial decision that the respondent was entitled to recover the money deposited by him for tarring and sanding both roadway and footpaths.

Gray K.C. and **Cooke** for appellants.
Cooper for respondent.

THE COURT dismissed the appeal (Stout C.J. dissenting). Owing to lack of space we publish an extract of only one judgment. SIM J. said: The rights of the parties in this case depend on the proper construction of Section 335 of the Municipal Corporations Act, 1920, and of Section 116 of the Public Works Act, 1908, as amended by the subsequent amending Acts. It is clear, I think, that Section 335 of the Act of 1920 does not deal with the construction of streets. It deals only with the subject of subdivision, and when a plan of subdivision is submitted for approval, the Council is not entitled to raise any question as to the way in which the proposed streets are to be constructed. That is a question which has to be dealt with under Section 116 of the Public Works Act. It is true that the expression "construction of streets" is used in sub-section 2 of Section 335, but the context makes it clear, I think, that it means there the laying out of streets in the subdivision. Section 335 has to be complied with before the owner offers any of the allotments in his subdivision for sale lease or other disposal. It is not necessary, however, for him to comply with Section 116 before offering any of his allotments for sale. He may sell his allotments, but he cannot give a proper title until he has complied with Section 116. In the present case the respondent made two applications simultaneously to the Council. One was for the approval under Section 335 of his plan of subdivision. That was duly granted. The other was for the approval, under Section 116, of the specification which set forth how the respondent proposed to construct the roadway, footpaths, kerbing channelling and concrete culverts in his subdivision. This specification was approved of "in accordance with the present existing conditions relating to the construction of private streets." The conditions referred to are specified in the by-laws of the Borough. These conditions impose on every person laying out a private street in the Borough the duty (inter alia) of tarring and sanding the roadways and footways. The question of the validity of this particular by-law was not argued, and it is not necessary to express any opinion on the subject. Assuming the by-law to be valid, it is clear, I think, that the Council was not entitled to treat it as applicable to the street in question here. The streets which are to be dedicated under Section 116 are required by sub-section 1 to be dedicated as public streets, and, when dedicated, are vested, by sub-section 5, in the Borough Council. Until dedication the proposed streets are merely strips of land belonging to the owner of the subdivision, and when dedicated they become public streets. They are not at any stage "private streets" as defined by Section 171 of the Municipal Corporations Act, 1920. It is clear, therefore, that the Council was not justified in imposing the conditions which it sought to impose on the respondent. The Council was entitled, under Section 116, to insist on the roadway of the street being formed and metalled to its satisfaction. It was not entitled, however, to insist on the roadway being tarred and sanded, for such work is not part of the formation or metalling of the street: **Cuthbertson v. Robertson**, 11 Gaz. L.R. 771. The section does not specify what has to be done in connection with the construction of footpaths. That has to be settled by agreement between the owner and the Council, and it would not be unreasonable for a Council to stipulate that the footpaths should be tarred and sanded. If in the present case the Council, instead of adopting the attitude it did, had entered into negotiations with the respondent as to the construction of the footpaths, these might have resulted in an agreement that they should be tarred and sanded. The Council, however, did not do that, but exacted from the respondent the payment of a sum of money by what was, in effect, an illegal demand. That sum was paid under protest, and the respondent is entitled to recover it back: **Morgan v. Palmer**, 2 B. & C. 729; **Fraser v. Pendlebury**, 31 L.J.C.P. 1. I think, therefore, that the appeal should be dismissed with costs on the middle scale as on a case from a distance.

Solicitors for appellants: **Frank H. Cooke**, Palmerston North.
Solicitors for respondent: **Cooper, Rapley & Rutherfurd**, Palmerston North.

SUPREME COURT.

Sim, J. September 2, 3, 1925.
Oamaru.

GIBSON v. BAIN.

Contract—Deposit paid—Contract concluded—Loan to be obtained from Government—This refused—Deposit paid to defendant's agent—Not stakeholder—Whether defendant liable to refund.

There was a concluded contract between the parties for the sale and purchase of the defendant's leasehold property. That sale was subject, however, to the condition that the plaintiff was not to be bound by the contract if a Government loan was not granted to her. By the contract, Walter Sumpter as agent for the defendant, sold, and the plaintiff purchased the property for £860, of which £50 was to be paid as a deposit and in part payment of the purchase money. The contract provided that the purchase money was to be paid as follows: "Within 14 days from the date on which the Government loan is granted and the sale is made subject to such loan being granted." Under this contract the plaintiff would have been liable for damages for breach of contract if she had neglected or refused to apply for a Government loan, and she would have been entitled to complete the purchase by paying the balance of the purchase money in cash without waiting for a Government loan. She did apply for a Government loan of £800 on the property. The letter of the 7th of May 1924 from the Superintendent of the State Advances Department to Mr. Macpherson contained a definite refusal to grant any loan, and was so treated by the plaintiff. The deposit was paid by the plaintiff to Mr. Walter Sumpter, the agent who arranged the sale, and he had retained it in his possession.

Ongley for plaintiff.
Hjorring for defendant.

SIM J. said: It was contended by Mr. Hjorring that the plaintiff ought to have sued Mr. Sumpter to recover the deposit and was not entitled to recover it from the defendant. There was, as I have said, a concluded contract between the parties and the deposit was paid to Mr. Sumpter, not as a stakeholder, but as agent for the defendant. When the application for a Government loan was refused, and the plaintiff elected to treat that as determining the obligations created by the contract, she became entitled to get back the £50 she had paid. The decision of the Court of Appeal in the case of **Ellis v. Goulton** (1893) 1 Q.B. 350 is a clear authority for holding that she is entitled to recover it from the defendant, and not from Mr. Sumpter. In that case on the sale of premises by auction the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. The sale went off through the default of the vendor. It was held that the payment of the deposit to the solicitor was equivalent to payment to the vendor, and that the purchaser was not entitled to sue the solicitor for the deposit, but must recover it from the vendor. The law on the subject is thus stated by Bowen L.J. at p. 352: "When a deposit is paid by a purchaser under a contract for sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of a stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal." I think, therefore, that the plaintiff is entitled to recover the amount of the deposit from the defendant. The fact that there was a concluded

contract in the present case distinguishes it from the cases, on which Mr. Hjorring relied, of **Richards v. Hill** (1920) G.L.R. 419 and **R. Stringer & Co., Ltd., v. Berrett** (1921) G.L.R. 240. Judgment for plaintiff for £50 with costs on the lowest scale and disbursements and witnesses' expenses to be fixed by the Registrar.

Solicitors for plaintiff: **Ongley & Bulleid**, Oamaru.
Solicitors for defendant: **P. C. Hjorring**, Oamaru.

Stout, C.J. October 28, 30, 1925. Wellington.

REX v. McGINITY.

Criminal Law—Wilful exposure—Wilful and obscene exposure—Verdict negativing mens rea—Effect of.

The prisoner was indicted that he wilfully and obscenely exposed his person etc. and the jury returned a verdict of "Guilty of committing the act but not wilfully or with criminal intent."

Macassey for Crown.
Leicester for prisoner: This is a verdict of not guilty.

STOUT C.J. agreed that the verdict was one of not guilty. He said: Section 156 of The Crimes Act, 1908, states:—

> "156. Every one is liable to two years' imprisonment with hard labour who wilfully—
>
> "(a) Does any indecent act in any place to which the public have or are permitted to have access; or
>
> "(b) Does any indecent act in any place, intending thereby to insult or offend any person."

And Section 41 of The Police Offences Act, 1908, says:—

> "(1) Every person is liable to imprisonment with hard labour for any term not exceeding one year who wilfully and obscenely exposes his person in any public place or within the view thereof, or wilfully does any grossly indecent act in any such place or within the view thereof, whether alone or with any other person."

It will be observed that the word "wilfully" is used in the definition of the crime. The jury has negatived the wilfulness. It is true there was no evidence given to show that the exposure was accidental. Indeed, if the evidence of the female witnesses called had been accepted it must have been held that the act was wilful. The jury, however, have found that on two occasions on different days the accused exposed his person and that his own statement in writing that he had done so was not accepted. In my opinion, by this finding of the jury, however absurd it may appear, the Court is bound. The two acts done by the prisoner are in the opinion of the jury not an offence and the prisoner must be discharged.

Solicitors for prisoner: **Leicester & Jowett**, Wellington.
Solicitor for Crown: **P. S. K. Macassey**, Wellington.

Stout, C.J. September 23, 26, 1925. Wellington.

N.Z. DAIRY CONTROL BOARD v. ATTORNEY-GENERAL.

Dairy Produce Export Control Act 1923—Whether Board could purchase newspaper whose objects are the publication of matter for promotion of dairy industry—Whether ultra vires Board.

This was an originating summons to determine whether the Dairy Export Board were empowered to purchase the "N.Z. Dairy Produce Exporter," a journal purporting to be the official organ of the Dairy Export Board. The plaintiff is the Dairy Board constituted under the Dairy Produce Export Control Act 1923. The Board is a body corporate with perpetual succession and a common seal, and is capable of holding real and personal property and of doing and of suffering all that bodies corporate may do and suffer. The Board has power to appoint such officers as it deems necessary for the efficient carrying out of its functions under the Act, and the Act says that the Board can control sale and distribution of New Zealand dairy produce, and may prohibit the export from New Zealand of any dairy produce save in accordance with the licenses to be issued by the Minister of Agriculture, subject to such conditions and restrictions as may be approved by the Board. The Board is also empowered to determine from time to time the extent to which it is necessary for the effective operation of the Act and for the fulfilment of its purposes, and the Board can in fact control the whole of the dairy produce in New Zealand. It has power, however, to make contracts for the shipping and carriage by sea of dairy produce, and it has power to make a levy on dairy produce exported from New Zealand. It has also power to insure against loss dairy produce, and generally, it can do everything for the due discharge of its functions in handling, distributing and disposing of New Zealand dairy produce. The Board's income is obtained by a levy under Section 15 of the Act in respect of the sale of dairy produce, and it can use that money in the payment of expenses, commission and other charges, payment of salaries and wages of officers and servants and travelling allowances, etc., etc. It appears from the accounts for the year 1923-24 that the moneys received by the Board as income for the 18 months from the 1st February, 1924, to 31st July, 1925, amounted to £77,979 15s 10d. The excess of income over expenditure was £46,681 3s. In the expenditure there are sums for the expenses of management such as printing, stationery, postages, telegrams, cables, salaries, insurance, etc., etc., and the expenses of Board meetings. The agreement that is referred to in the originating summons is an agreement between the Board and a Mr. Heighway by which the Board agrees to purchase from Mr. Heighway copies of the paper called the "New Zealand Dairy Produce Exporter," which is headed: "Official Organ New Zealand Dairy Produce Export Control Board." The Board under the agreement is to pay the sum of £60 per month to the publisher of the newspaper, and for this £60 a month the Board is to have not less than 60 column inches, equal to two full pages of a type space of approximately 11 by 6½ inches for the publication by the Board in the said newspaper or journal of a monthly statement and review by the Chairman of the Board of the activities and transactions of the Board, of information calculated to promote and encourage the dairy industry, etc., etc. There is also to be in addition to the 60 column inches, 360 column inches, equal to 12 pages of further information relating to dairy produce and dairy work. The publisher is to despatch free of cost to the Board and to the recipient each month forthwith on the publication of the said newspaper or journal to each dairy farmer one copy. The number of copies issued to the dairy farmers amounts to the large number per month of 55,876. These persons are all producers, and are the people who have the election of the nine representatives on the Board. The postage, which is a halfpenny a number, is to be paid by the Board. The total cost, therefore, to the Board of the 60 inches a month of the newspaper amounts to about £2000.

Skerrett K.C. and **Emery** for plaintiff.
Fair K.C. (Solicitor-General) for defendant.

STOUT C.J. held that the purchase desired was intra vires the Board and made an order accordingly.

Solicitors for plaintiffs: **Chapman, Skerrett, Tripp and Blair**, Wellington.
Solicitor for defendant: **Crown Law Office**, Wellington.

Alpers, J. September 2, 4, 6, 11, 1925. Auckland.

PATRICK v. AUCKLAND CITY COUNCIL AND BOROUGH OF NEWMARKET.

Local authority—Negligence in construction or repair highway—Whether nonfeasance or misfeasance.

This was an action for damages against the two defendants who were responsible for the maintenance of the highway at the place plaintiff sustained damage to his motor car. The facts are unimportant for the part of the decision noted. The learned Judge discusses the defence of nonfeasance on the part of a local authority.

Beckerleg for plaintiff.
Cocker for City Council.
Tong for Borough Council.

ALPERS J. found for the plaintiff on the facts and awarded damages. With reference to the defence he said: The defendant the Newmarket Borough Council relied upon the familiar defence of nonfeasance. When the particular section of the highway was re-opened, it was, so the defendant contended "reasonably safe for traffic"; if it had become unsafe by the date of the accident this was due merely to an omission to repair; and such omission did not involve the defendant in liability. This contention

would no doubt be sound had the road been left in its normal condition and simply allowed to fall into disrepair. But it is obviously not the normal condition of a highway to have a tramway area in the middle of it with a surface 3 inches lower than the other parts of the road. The inclined plane constructed along the "tramway margin" to bridge over the difference in level was an artificial and temporary structure. In the state in which I find it to have been on the date of the accident it constituted, at night at any rate, a dangerous trap. In the case of **Mayor of Shoreditch v. Bull** (90 L.T. 210) the highway authority had dug a trench along a road for the purpose of laying a sewer. When the work was completed the workmen filled in the trench and opened the road for traffic. A week later the plaintiff, driving a cab, found the road where the trench had been opened was soft and crossing over the road to avoid it, ran into a heap of rubbish and capsized his cab. The jury found that the part of the road where the trench had been opened had been properly filled in but had been rendered soft by subsequent rain and was dangerous to traffic. Lord Halsbury in delivering the judgment of the House of Lords, which held the corporation liable for the injury, discussed the application of the doctrine of nonfeasance:

> "I am desirous of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor of highways, may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of nonfeasance in several of the cases in which the proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to show that the act which was being done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible."

Counsel for the defendant Borough relied strongly upon the evidence of the engineers that at the date the section was re-opened it was, to all appearances, reasonably safe for traffic. But that is not enough. In the case of **Thompson v. The Bradford Corporation** (1915 3 K.B. 13) the defendant Corporation determined to widen the highway by setting back the kerb stone and throwing the causeway into the road. On the edge of the causeway was a telegraph pole which it became necessary to remove. It was removed accordingly and the hole filled in. On the day when the barriers were removed and traffic permitted to pass along the road the surface appeared to be in good order and there was nothing in the appearance of the road to indicate that the hole had not been properly filled in. Some days later the wheel of the plaintiff's waggon sank into the hole and the waggon was damaged. Bailhache J. in delivering the judgment of the Court in favour of the plaintiff said:

> "What is the duty of a highway authority which makes a new road? The duty is to make it so that when the authority throws the road open to the public for public use the road shall be reasonably safe for the purposes for which it is intended to be used. In this particular case very heavy traffic passes over this road, and in my judgment it was the duty of the highway authority who were making this road and who were intending to throw it open for the traffic to see that it was reasonably fit for that purpose." . . . "In my judgment the corporation are liable on the simple ground that in altering the character of this road—turning it from a footpath into a roadway for heavy traffic—there was an obligation upon them to see that when they opened it to the public it was fit for the traffic and purposes for which it was intended to be used."

I am of opinion therefore that the plaintiff is entitled to recover damages against the defendant the Newmarket Borough Council.

It appeared in the course of the trial that the other defendant, the Auckland City Council, had through its responsible officer made an agreement with the Newmarket Borough Council that the latter body should, during the progress of the road construction and as a temporary arrangement undertake the maintenance and upkeep of the "margin" the defective state of which caused the accident. In these circumstances the Auckland City Council is clearly not liable to the plaintiff. But although the solicitors for all three parties had been perfectly frank with one another this arrangement between the two bodies had not come to their knowledge before the trial and the plaintiff was fully justified in claiming against both defendants. I understand from counsel that the two defendants will settle the incidence of costs between them; I need therefore do no more than dismiss the action against the Auckland City Council without costs.

Solicitors for plaintiff: **A. Hanna**, Auckland.
Solicitors for City Council: **Stanton, Johnstone & Spence**, Auckland.
Solicitors for Borough Council: **Hogg, Tong & Player**, Auckland.

Ostler, J. September 10, 22, 1925.
Masterton.

MAURICEVILLE C.C. v. KILMISTER.

Local Body—County Council—Damage to road—Negligence—Whether action maintainable without joining the Attorney-General.

On the facts as found by the learned Judge defendant's servant negligently drove his motor lorry resulting in damage to a bridge under the care and management of the County Council. The plaintiffs repaired the bridge and sued the defendant for damages to the amount of the cost of repairing the bridge.

Jordan for plaintiff.
C. A. L. Treadwell for defendant.

OSTLER J. found the facts in favour of the plaintiffs and in respect of the nonsuit moved on the ground that no action lay at the suit of the Council he said: The first question raised is whether the plaintiffs can maintain an action for injury to a bridge under their control without joining the Attorney-General. It is argued by Counsel for defendant that they cannot do so, on the authority of **Tuapeka County Council v. Johns** (32 N.Z.L.R. 618). By Section 102 of the Public Works Act 1908 all roads (which includes bridges) are vested in the Crown, together with all materials and things of which roads are composed. But by Section 155 of the Counties Act 1920 the care and management of all County roads and all bridges thereon are vested in the County Council in whose county they are. Although a County Council cannot be compelled to do so by indictment or by action it has not only a right but a duty to maintain the roads and bridges the care and management of which are vested in it, and in my opinion this right and duty carries with it a right to bring an action for negligent damage done to a bridge, without joining the Attorney-General. In the **Tuapeka County Council v. Johns** (33 N.Z.L.S. at p. 623) Williams J. says:—

> "In any case no cause of action would arise to the Council until the road itself was destroyed or injured. If a cause of action then arose to the Council it would be because the acts of the defendants had interfered with the right of control and management and the powers of maintaining in repair given to the Council by the Act."

This case was considered in **Snushall v. Kaikoura County Council** (1920) N.Z.L.R. 783, where it was held by the Court of Appeal that a County Council was entitled to commence an action for a wrongful interference with the roads under its control without joining the Attorney-General. The cases have since been collected and the principle usefully explained by Reed J. in **Hutt County Council v. Whiteman Bros.** (1925) N.Z.L.R. 751. In my opinion the authorities make it clear that a County Council can bring an action without joining the Attorney-General for the recovery from a defendant of the cost of repairing a bridge which has been damaged either wilfully or negligently by that defendant, or by someone for whose acts he is liable.

Solicitor for plaintiff: **T. Jordan**, Masterton.
Solicitors for defendant: **Treadwell & Sons**, Wellington.

Alpers, J. September 8, 11, 1925.
Auckland.

CRAIG v. PEACOCK.

Mortgages Extension—Notice of intention to call up—Transferees of mortgagor object—Original mortgagor takes no step—Effect of on application.

The plaintiff claims from the defendant payment of principal moneys due under a mortgage. The facts are not in dispute and the claim comes before the Court in the form of a case stated. The plaintiff is administratrix of the estate of her late husband James Henry Craig. By Memorandum of Mortgage, dated August 1st, 1916, the defendant William McRae Peacock covenanted to repay James Henry Craig a principal sum of which there remains due and owing at the date of the action £1171 6s 3d. On August 15th, 1919, the defendant transferred to Eric Waldemar Friedlander and Emil Friedlander all his estate and interest in the mortgaged land. On September 2nd, 1924, the plaintiff gave to the defendant and to each of the transferees a notice of her intention "to call up and demand payment of the principal sum . . . and to exercise all or any of her powers and in particular the power of sale contained and implied thereunder at the expiration of two calendar months" from the date of service of the notice. On October 20th, 1924, one of the transferees Eric Waldemar Friedlander lodged with the plaintiff an objection to the exercise of her powers. The defendant himself lodged no objection. No further or other notice was given to the defendant and the plaintiff has not applied to the Court for leave to call up or to demand payment of the principal moneys or to commence any action for breach of any covenant in the Mortgage. The writ was issued on March 26th, 1925.

Endean for plaintiff.
McVeagh for defendant.

ALPERS J. said: Both the notice of intention to exercise the powers under the Mortgage and the only notice of objection lodged were antecedent to the 24th day of October, 1924—the date of the coming into operation of "The Mortgages Final Extension Act" of that year. "Proceedings" had, therefore, been commenced within the provisions of the saving-clause—Sec. 21 (2) (**In re Leigh's Mortgage** 1925 G.L.R. 32; **Whitton v. Tyler** 1925 G.L.R. 154.)

The question for the Court is whether the plaintiff is entitled to recover from the defendant, who did not lodge a notice of objection, in spite of the fact that the transferee Eric Waldemar Friedlander did.

The learned Judge came to the conclusion that it would be impossible to give "full effect to the intent of the Act" and full scope to this wide equitable jurisdiction if the omission of one or more of the parties affected to lodge notice of objection would enable the mortgagee to ignore the objection lodged by another or others and to proceed to exercise his powers without bringing them before the Court. The learned Judge also came to the conclusion that a consideration of the language of Clause 4 was conclusive against the plaintiff.

Solicitors for plaintiff: **Endean & Holloway**, Auckland.
Solicitors for defendant: **Russell, Campbell & McVeagh**, Auckland.

Ostler, J. September 15, 21, 1925.
New Plymouth.

IN RE HART DECEASED.

Practice—Application to Court to approve executor's compromise—Motion ex parte.

The executor and trustee of the will of W. S. Hart agreed to reduce a mortgage on the property of the deceased subject to the consent of the Court. Application was made by motion ex parte.

C. H. Weston in support.

OSTLER J. said: "In my opinion these proceedings are not in order and a Judge has no jurisdiction on an ex parte petition to sanction such a compromise by an executor. By Section 2 of the Trustee Amendment Act 1924, however, an executor or a trustee with power to act alone may compound any debt due to the testator's estate without being responsible for any loss, so long as he acts in good faith. It is therefore quite unnecessary for the executor if acting in good faith to obtain the approval of the Court. If, however, the executor as a matter of precaution desires the approval of the Court to this compromise he must either proceed by way of originating summons, or by petition under Section 75 of the Trustee Act 1908. In either case the proceedings are not ex parte, but must be served on such of the interested parties as the Judge may direct, and those parties are entitled to be heard. In these proceedings, although no doubt intended to be under Section 75 of the Trustee Act 1908, no directions have been asked as to service, no information is given to the Court to enable it to judge as to who the interested parties may be, there is no copy of the will, and no copy of the power of attorney under which the petitioners purport to act. Under these circumstances the motion founded on the petition must be dismissed.

Solicitors for the petitioners: **Ebbett & Gifford**, Hastings.

Ostler, J. September, 1925.
Wellington.

W. H. ALLEN v. N.Z. MEAT PACKING AND BACON COMPANY, LIMITED.

Practice—Interrogatories—Action by shareholders to rescind—Misrepresentation Company's financial position.

This was a summons for an order for leave to administer interrogatories against the defendant company. The claim was based on the defendants false representations with regard to its financial position.

Gray K.C. and **Morrison** in support.
Skerrett K.C. and **Smith** contra.

OSTLER J. said: The first proposed interrogatory objected to is No. 16 which is as follows:

> "16. Did the New Zealand Co-operative Dairy Company Limited send to all its shareholders in March 1921 a circular inviting them to take up shares in defendant company? If so was such circular sent out at the request of the defendant Company? Did such circular disclose that the Bank of New Zealand had threatened to wind up the defendant Company?"

In my opinion this interrogatory is relevant to the issue as to whether the Company made false representations as to its financial position, and ought to be allowed. The next proposed interrogatory objected to is No. 21, which is as follows:

> "Did any of such brokers or canvassers mentioned in Interrogatory 4 while so employed by the Company sell shares in the Company on behalf of any of the Directors of the Company?"

In my opinion this question is relevant to the issue whether the Company made false representations as to its financial position. If the directors of the Company were aware that some of the directors were disposing of their shares at the very time and by the very agents appointed by the Company to sell its new shares, it is some evidence from which the directors' knowledge of the financial position of the Company may be inferred. I accordingly allow Interrogatories 21, 22 and 23 which deal with the same subject. If the Company or its directors as a body were unaware that any of the directors were disposing of their shares then the questions will not embarrass the Company. The next objection on behalf of the Company is to Interrogatories Nos. 24 to 27. These deal with building operations conducted by the Company at its Ngahauranga works. It is claimed that these questions are relevant to the issue as to whether the Company at the time the contracts were made which it is now sought to rescind, knew it was in a bad financial position. Paragraphs 6 and 7 of the amended statement of claim are as follows:

> "6. At each of such meetings and interviews the defendant Company's said representative represented either directly or by necessary implications that the defendant Company was in a sound financial position and quite solid."
>
> "7. At the time when such statements were made the defendant Company was in fact in serious financial difficulties and in particular held considerable stocks of frozen meat and tinned meat and other produce upon which the defendant Company had at the time of making such statements or within a short time thereafter suffered a loss to the extent of £80,000 or thereabouts."

No other reason is stated in the statement of claim for the Company's knowledge of its unsound financial position, except that it knew it would be bound to make a heavy loss upon this £80,000 worth of frozen and tinned meat and other produce. The claim has been limited to this by the plaintiffs themselves. The interrogatories dealing with the Company's building operations are irrelevant to any issue raised by the statement of claim, and therefore must be disallowed.

COURT OF ARBITRATION

Frazer, J. September 7, 29, 1925.
Westport.

McLAGAN v. BLACKBALL COAL CO., LTD.

Workers' Compensation—Sec. 5 (10)—Attendance by Club surgeon—Whether injured entitled claim up to £1 for same.

This was a test case to have the rights of parties settled. The facts are immaterial. The sole question was whether when a miner meets with an accident and receives surgical assistance from the Club surgeon the injured man is entitled to claim an amount not exceeding £1 in respect of that assistance.

O'Regan for plaintiff.
P. B. Cooke for defendant.

FRAZER J. said in giving judgment for defendant: Neither the Club nor the injured man makes any direct payment to the surgeon in respect of his attendance in connection with the particular injury. The Club pays the surgeon an inclusive annual salary, and the worker makes an inclusive annual contribution to the Club. It is contended that an injured worker, if not a member of the Club, would certainly have to pay at least £1 for the attendance and certificate of a surgeon; and that a member of the Club really pays this sum to the Club when he pays his annual subscription, which, as already stated, entitles him to all medical and surgical attendance that he and his family may require. Section 5 (10) provides that, in addition to the compensation payable to an injured worker, there shall be payable a sum equal to the reasonable expenses incurred in respect of medical or surgical attendance (including first-aid) on the worker in respect of his injury, but not exceeding £1. Section 14 (2) provides that, in determining the amount payable by an employer for medical or surgical expenses pursuant to Sections 4 and 5, no account shall be taken of any moneys payable by or to a friendly society or other organisation in respect of any such expenses. Section 5 (10), it will be seen, requires, first, that the sum payable for surgical attendance shall be an ascertained sum: it is to be "equal to the reasonable expenses incurred", but with a limit of £1. Secondly, the expenses must be "incurred", that is, there must be a liability to pay them, though not necessarily by virtue of a contractual obligation (Stroud's Judicial Dictionary, Vol. II and supplementary volume, under "incur", and cases cited). Thirdly, the expenses must be incurred "in respect of medical or surgical attendance on the worker in respect of his injury": not only must there be a definite liability for an ascertained sum, but it must be in respect of the specific injury for which compensation is claimed. Section 14 (2) must be read as an addendum to sections 4 and 5. The expenses referred to in Section 14 (2) are obviously such expenses as come within Sections 4 and 5; and, so far as the present case is concerned, Section 14 (2) can be applicable only if such expenses as are mentioned in Section 5 (10) are payable by the medical Club. The present plaintiff has not brought himself within Section 5 (10) or Section 14 (2), for no liability for an ascertained sum has been incurred by him or the medical Club for surgical attendance in respect of the particular injury suffered by him. If the attendance of the Club surgeon had not been obtainable when the plaintiff was injured, and the Club had become responsible for payment of the fee of another surgeon for attendance on the plaintiff in respect of his injury, the case would, no doubt, have come within Sections 5 (10) and 14 (2), for then a liability would have been incurred for an ascertained sum for surgical attendance in respect of a specific injury, and the Court would not have been concerned to enquire whether the injured man had himself paid the surgeon's fee or the Club had paid it for him. Judgment is for the defendant Company.

Solicitor for plaintiff: **P. J. O'Regan**, Wellington.
Solicitors for defendant: **Chapman, Skerrett, Tripp & Blair**, Wellington.

BENCH AND BAR.

Mr. Justice Alpers, who was recently laid aside through ill-health, is now restored to health and is at present engaged on circuit work at Napier.

Lower Court Jurisdiction.

In the London letter of the issue of the 9th June last there is a reference to the rapid development, in England, of the County Court jurisdiction and importance, and an interesting case is referred to in which a defendant in a running down case insisted either that the plaintiff must give security for costs, having regard to his lack of visible means to pay the costs of a Cost High Court action, or that the case be remitted to the County Court, notwithstanding the amount involved. The case was remitted to the County Court, and damages were awarded, in the sum of £500. This draws attention to the quesion of the jurisdiction of the Magistrate's Court of this Dominion. The Magistrate's Court has jurisdiction in cases where the amount involved does not exceed £200. There is provision that if the amount involved exceeds £100 the case may be removed into the Supreme Court by either party. Another provision gives jurisdiction whatever the amount, but not in excess of £500, where the parties agree in writing. This latter provision recognises the advisableness of the Magistrate's Court having jurisdiction to deal with cases involving sums not in excess of £500 but the requirement that the parties shall agree in writing does not have regard to the weaknesses of human nature. Parties whose differences have reached such a stage that litigation is regarded as the only method of settlement are seldom in a mood to agree with one another about anything, and the necessity for an agreement in writing between them to give the Court jurisdiction, in practice, makes the provision almost useless. If, however, the Court were given jurisdiction to deal with cases involving sums up to £500 then the provision permitting removal into the Supreme Court when the amount involved exceeds £100 would be used in those cases only where one party for some reason considered that course advisable, and the wider jurisdiction would be made use of in a great many cases. The abolition of the District Court with its intermediate jurisdiction increases the need for a review of the Magistrate's Court jurisdiction. When proceedings may be taken in the Lower Court there is not only a saving of expense but there is despatch. A summons from the Magistrate's Court may be issued, served, and the case heard, within a fortnight. An extended jurisdiction for the Lower Court would, therefore, save litigants expense and delay (and, further, it would be a check upon the issue of proceedings taken for the purpose of forcing another party to settle rather than face the expense of a High Court action). Apart from the above there is an obvious reason for the extension of the Magistrate's Court jurisdiction. At the time when the present jurisdiction was fixed money had a greater value, perhaps double the value, than it now has, so that the jurisdiction of the Court then was in reality wider than it is to-day. That the need for a wider jurisdiction is felt is proved by the number of cases in which part of the claim is abandoned in order to bring them within the jurisdiction of the Court. An extended jurisdiction of the Magistrate's Court would give some relief to the Supreme Court, and it would be a saving in delay and expense both to the country and to litigants. Further relief to the Supreme Court would be given, and a like saving in delay and expense would be made, by amending the Justices of the Peace Act to permit

Magistrates, with the consent of the accused, to hear criminal cases in which under the Crimes Act the punishment for the offence does not exceed five years' imprisonment. In such cases a Magistrate should be given power to impose a sentence not exceeding two years' imprisonment. The limited punishment which could be imposed would in many cases attract the consent of the accused, while, on the other hand, it would lead to a Magistrate refusing to deal with a case when it appeared to be of a serious nature and such that any punishment he could impose would be inadequate. Amendments of the Magistrates' Court Act, and of the Justices of the Peace Act, to give effect to the above would be in the best interests of the Community.

LONDON LETTER.

The Temple, London,
2nd September, 1925.

My Dear N.Z.,

When we come to deal with the present Lords Justices of Appeal, we are on delicate ground. There are sufficient weaknesses about our present Courts of appellate jurisdiction to render their damnation easily possible by a meed of faint praise. Even, however, while these weaknesses are being discussed among us, I for my part feel instinctively that we may well be attaching too much importance to what may equally well be a passing phase; moreover, it may be that our readiness to criticise is the more pronounced because the objects of it are the less aloof. Their very humanity and, on the whole, gentleness may have for them the unjust effect of loosening our tongues unduly. I will say no more as to their corporate ability; I will take them as men, predicating the appropriate atmosphere by calling your attention to a physical matter at the outset: whereas Scrutton L.J. has a full beard and moustache and Sargant L.J. a not inadequate moustache, Bankes L.J. is quite the most clean shaven man I have ever in my life beheld. I cast my mind back to the time when Vaughan Williams L.J. occupied the position, of President of the second Court of Appeal, presently occupied by Bankes L.J.; and the contrast of the two men inevitably forces the observation that the latter must be quite the cleanest looking and the tidiest Judge who has ever sat on the English Bench.

"In those old days which poets say were golden
(Perhaps they laid the gilding on themselves)",

in those old days when the value of a sovereign was a pound sterling and everyone was prosperous and everything was cheap, in those old days of a decade and a half ago when litigation was at the top of its form and arrears in the lists shewed no signs of diminishing but the accumulations constantly increased, then in every case worth mentioning was Eldon Bankes K.C. briefed on one side or the other, as a leading or second leading string. No terrific advocate and no outstanding lawyer, he had developed to perfection the art of being a gentleman and giving an air of true gentility to any cause with which he was associated. He is himself essentially an English, country gentleman, as is apparent at once to all who appear before him and especially to those who appear before him in his less known capacity of Chairman of County Quarter Sessions in his north-west county. Quick on to any point in his favour, he would, as advocate, develop it with a polite and pleasant insistence which, however mistaken you might at first think it, could not fail to charm you. There are few more valuable assets to a litigant than that his counsel should, from first to last, enjoy the affectionate regard of the jury! Solicitors were thus invariably pressing in their demands upon his services; it was a familiar sight, of fifteen or more years ago, to see Eldon Bankes K.C. arguing from the front bench with a courteous, unflustered deliberation, while at the end of the silks' seat stood his clerk, beckoning him to another court where, in his absence, storms were brewing. It is odd how barristers' clerks assimilate the outward characteristics of their masters; Eldon Bankes' clerk was always well, but quietly, dressed, neat of appearance and in deportment unperturbed, however many storms might be brewing in however many courts. Mr. Justice Bankes, as a Judge of first instance, was a model of all that such a Judge should be. Urbanity was the essence of the business in that Court; right and all the proprieties were firmly insisted upon, but consideration for counsel, solicitors and litigants was invariable. Any reasonable demand, of personal convenience, would at least be frankly entertained and reasonably discussed; the machinery of his Court worked on oiled wheels, the urbanity of the Judge being reflected in the polite attention and wordly wisdom of the Judge's clerk. Here, I must repeat, was the very picture of an English gentleman and his gentleman servant. According to his kind, he has an infallible common sense and displays the just outlook of the perfect magistrate. Of his present title, Lord Justice Bankes, I emphasise the first word; he is not yet a Peer of the Realm, but he is much more like one than are most.

At the same epoch, some fifteen to twenty years ago, Mr. Warrington was a quiet but universal influence in the world of Chancery, beloved of all for his very genial courtesy and by all listened to, with respect, for his great learning and ripe wisdom. His art is that of being pleasant always but never a nonentity; his qualifications, those of a profound if bland and smiling lawyer. He was the same man on the Bench of the Chancery Division, and is the same man as Lord Justice of Appeal. Still at the same epoch, Scrutton K.C. was dominating over the world of commercial contentions, and in the Commercial Court carrying all before him except his most frequent opponent, Hamilton K.C. Of the latter, now Lord Sumner, I will write my panegyric later; the former, Scrutton L.J. was always most distinguished by his massive force. Bearded, as I have said, and large, I have the feeling that I have never seen him either stand or sit perfectly erect and that, if he did so, only the fringes of the beard would be visible to us below. He has no need, and I believe no intention, to quarrel with anyone, nor can there be anything of brutality in the constitution of a giant whose out-of-work passion is for music. He is too big to sneer, and is too learned and intelligent to have need to resort to a defence of sarcasm; and any real petulance of character is quite inconceivable in one of his physical and intellectual proportions. If, then, you recall from the past or receive, upon a future visit to the Court in which he sits, an impression of a man cross-grained, attribute the signs to some hidden and insignificant cause and assure yourself, as I continue to assure myself, that he is not what his manner suggests but is what his face and figure should indicate. Un-

doubtedly he has a certain conceit; but who, with his record behind him and his authoritative work to his credit, would not have? And I think that his long continued battles in the forum, with the now Lord Sumner and the then incomparable genius and first intellect of the Bar, always necessitated Scutrton's straining even of his own great powers and even of his own weighty personality in order to keep pace with the rapid, smooth, unerring and resistless working of a six-cylinder, sixty horse-power brain. It was my entertainment as a young man to sit for hours and listen to them, at forensic war; high as is my admirtion, and must be anyone's admiration, for the qualities and attainments of Lord Justice Scrutton, I felt always that his struggles with Lord Sumner were unequal.

Lord Justice Atkin, next in the list, is of a different date and a very different stature. His familiars and friends, in the days of my pupilage, used to call him, I think, "little Atkin." There is a saying that valuable parcels are wrapped up small, and Atkin L.J. certainly illustrates the truth of it. He is not really diminutive; I dare say that, in fact, he is the average size in figure and feature of most of us. He is very spare; he is by no means disagreeable and he may just possibly be called agreeable of expression, but only just. Keenness is the predominating attribute both of his face and of his mind; and, here again, if you first feel the impression of acidity about him, discount the outward symptom and be sure that he is, at times, merely too keen. He makes none of the mistakes of a mind in a terrible hurry, though he often shows the irritation of a mind working at a very high speed. That there is no vice and nothing whatever vicious about that irritation, is plainly demonstrated by the exercise of it nearly as much upon his brother Lords Justices as upon the arguing counsel who has to cross his mental path. It is a curious phenomenon, but I think a true observation, that, with the exception of the Master of the Rolls, none of the appellate Judges has undergone the least change in the process of promotion to the Bench of the Courts of Appeal. On the whole, the promotion has an inevitable, and possibly a very desirable, effect; this letter will close upon a typical instance. Though he has an innate instinct for the current judicial conclusion, the quality of advocacy remains at its full momentum in Lord Justice Atkin's constitution. It is widely said that he has long contemplated, and still contemplates, the extraordinary expedient of resigning from the Bench in order to return to the Bar, thus to develop to its full maturity and profit an advocate's career prematurely brought to an end by the rapidity of its own success. I am far from saying that there is any foundation in fact for this frequent assertion; it is quite likely that it is the invention of someone who has observed the vitally surviving advocate in the Judge and has made a prophecy accordingly. I certainly hope that there is no such prospect; even the most devoted advocate, given he had the brains of Lord Justice Atkin, could not escape being mellowed by years spent a-judging. In five years time, our subject may conceivably have developed into a Lord Justice of Appeal of a weight and worth equivalent to that of the greatest whose names, in the Law Reports, precede the initials "L.J." It is a marked characteristic of these little men, spare and keen, that they stay the course and arrive at the finish with a magnificent sprint.

Lastly, of the actual team, there is Lord Justice Sargant, whom, if I was a cartoonist, I should depict as a nice old, shaggy old, wire-haired terrier and label my cartoon "The Professor." In the hands of some great lawyers, the Law is like an immature claret, with none of the chill taken off it and with much about it to revolt the palate and make the wine a mere medicine. In the handling of Sargant L.J. it is a tawny, vintage port, to be discussed en connoiseur with men of trained taste, and to be well sensed before being swallowed. He was, in the past to which we have referred, Junior to the Treasury on the Chancery side; the British Treasury, which is by far the best of our Departments, has a very nice discrimination in this matter; Sargant, Tomlin, Dighton Pollock constitute an admirable series of Attorney-General's Chancery "devils"; it is good that men, so well chosen and so richly deserving their choice, should go automatically and without the risks of "silk" to the Bench. We knew little of him at the Bar, except that every now and then we saw a wise man, of uncertain age, rise and utter some abstruse arguments upon some profound point, of which the Court took care not to miss a word. There is an occasional, high pitch about his voice, which might be querulous in any less benevolent man; there is a certain ruthlessness about his pursuit of a point, hostile to your contention, which is very surprising and not a little confusing, in such a benevolent man. Yet his benevolence is real; it is not an expression assumed to constitute a trap; nor on the other hand, does it amount to such absolute kindliness as to temper the wind to the lamb shorn of sound arguments. He spent a few, but not a very few years on the Bench of the Chancery Division, where his academic brilliance was much appreciated but was felt to be wasted on that part of a Chancery Judge's work which is most ably discharged by the application of the instincts of a man of affairs. His promotion to the Court of Appeal was timely and if ever a man's career has been throughout consistent with the obvious fitness of things, then has that of the "Professor", Lord Justice Sargant.

I forget exactly what I wrote about the President, Lord Merrivale, in my last letter, except that I promised to repeat it in this letter. We go back to the same epoch, to see Mr. Duke at the zenith of his career, as advocate, swaying juries with the sonorous eloquence of his deep bass voice, terrifying lying witness with the almost ponderous dignity of his whole atmosphere. A fine, strong type of man, as it might be the champion hammer-thrower of his day, and, Peer though he now is, very typical and representative of the good, British Commoner, he was a dogged advocate with a marked devotion tc the partisan and one-sided functions of the nisi prius pleader. To my thinking, every shred and sign of this professional character has been thrown off, and all the character of the English Judge most admirably assumed instead. A subtle, inperceptible change in the booming voice has converted that instrument from a lever of juries to a weapon of justice. Whatever may be said of his discharge of his other functions (and I believe that only the best is said) he is perfection of a Presiding genius in the Courts of Divorce; the only pleasant thing there is about that most unpleasant subject. He is ex officio member of the Court of Appeal; of those who go to make up that Bench, the critic in law may say what he likes, but no one can deny their manly qualities.—Yours ever,

INNER TEMPLAR.

FORENSIC FABLES

No. XI.

THE WITTY JUDGE AND THE BRONCHIAL USHER.

A Witty Judge, while Perusing the Depositions for the Forthcoming Sessions at the Old Bailey, Saw the Chance of a Lifetime. A Prisoner Bearing the Name of William Shakespeare was Charged with Obtaining Money by False Pretences. It seemed that his Habit had been to Simulate Epileptic Fits in Order to Arouse the Sympathy of Bystanders. His Stock-in-Trade was a Piece of Yellow Soap, which, Diligently Chewed, Produced the Effect of Foaming at the Mouth. This Symptom, Together with Gnashing of the Teeth and Rolling of the Eyes, had Convinced Large Numbers of Spectators of the Genuineness of his Attacks, and William Shakespeare had Consequently Enjoyed an Income which was Amply Sufficient for his Daily Requirements.

The Witty Judge Felt that, if at the Appropriate Moment, he were to Observe that this Seemed to be a Case of Poeta Gnashitur Non Fit, his Reputation as a Jester of the First Order would be Made for Ever.

The case of R. v. Shakespeare Came On in Due Course. Unhappily (as it Proved) the Usher of the Court was a Bronchial Subject. On the Day in Question he was Afflicted with a Heavy Catarrh and a Remunerative Cough. Half Way through the Opening of the Case for the Prosecution, which was Conducted by a Counsel of No Importance, the Witty Judge Felt that the Psychological Moment had Arrived. By Way of Preparing the Ground he Asked in an Innocent Manner Whether there was not Once a Poet named William Shakespeare. Counsel Replied in the Affirmative. The Witty Judge was in the Very Act of Loosing Off his Epoch-making Jest when the Bronchial Usher was Seized with a Paroxysm of Coughing which was Audible in Newgate Street. Then an Appalling Calamity Occurred. The Counsel of No Importance, Resuming his Interrupted Address, said that his Lordship's Question Prompted the Remark that This was a Case of Poeta Gnashitur Non Fit. He had Made the Witty Judge's Joke. The Court Rocked with Laughter, in which the Prisoner (who was Something of a Scholar) Heartily Joined, and the Reporters Signalled to their Messengers in Order that the Stop-Press Editions might give to the World the Joke of the Century.

The Witty Judge was Equal to the Occasion. With Austere Dignity he Rebuked the Counsel of No Importance for his Unseemly Levity, and Begged the Press, in the Interests of Decency, Not to Allude to an Incident which had Distressed him Greatly.

When the Court Rose the Witty Judge Told the Bronchial Usher Exactly what he Thought of him, and Caused him to be Transferred from the Old Bailey to the Commercial Court.

Moral: Preparation is the Soul of Wit. O.

CONTEMPT OF COURT.

Contempt of Court in one of its protean forms has been again before the Court of Appeal in the case of the Attorney-General v. Davidson and Others on which a note by a learned contributor appears in the last issue (p. 226). I entirely disagree with the view taken by him, a view which apparently arises as the result of his considering the question from the point of view of the newspaper and not from the point of view of the prisoner whose chances of a fair trial were seriously affected by the publication of the paragraph in the "Sun." If that was the effect of the publication as in the judgment of Reed J. the learned Judge points out it was, then the question of the propriety of the publication is to be considered not from the aspect that the effect of the judgment may be to restrict the matter that may be published by a newspaper before or during the trial of a prisoner, but from the point of view of the prisoner who by the publication in question is prejudiced in his fair trial by the comment before or during his trial. The right to such a fair trial is one the preservation of which is far more important than is the right of Editors and Subeditors to be saved from the invidious position suggested by the writer of the article under discussion to be the result of the decision of the Court. The jurisdiction in Contempt of Court may be, perhaps is, a somewhat anomalous method of protecting the right of a prisoner to a fair trial; but whatever may be said on that question the jurisdiction is not likely to be abused and is a much more convenient method of punishing the delinquent Editor than is procedure by indictment which has been adopted in some at least of the cases reported.

A fair report of the evidence is the right of a newspaper and indeed of the public. No one can quarrel with that. But comment whether on the evidence or on what takes place in Court is properly excluded until the determination by the Jury of the prisoner's guilt or innocence. The dangerous doctrine is put forward by both the Judges who constituted the minority of the Court that because the bias of the witness in favour of the prisoner as shown by her "quick smiles" at him while giving her evidence, was or must have been evident to the Jury nothing wrong was done by the newspaper in drawing attention in the method adopted by it to the bias in the prisoner's favour shown by the witness. A moment's reflection would I should have thought have satisfied the learned Judges this principle might easily result in

a very undesirable extension of the right of reporting possessed by newspapers.

But the Chief Justice does not seem to be altogether satisfied with the conclusion at which he arrived. He says "it is a pity perhaps that the paper should have published what may be termed the antics of a witness who does not seem to have been properly impressed with the duty she was performing of giving evidence" . . . . Though why it is a pity if as the Chief Justice thought the newspaper was within its rights in the publication, I find a difficulty in seeing. Ostler J's somewhat lengthy judgment seems to be little more than an expression of regret for his inability to see that the newspaper's article was anything more than a statement of fact. I respectfully concur in the pithy and accurate statement of the law contained in the judgment of Sim J.

It is to be regretted that the Chief Justice and Mr. Justice Ostler expressed their reliance in coming to the conclusion they did on the decision in R. v. "The Evening News" ex p. Hobbs L.R. 1925 2 K.B. 158 a case in which the "Evening News" had published a report of a charge to the Grand Jury by the Recorder of London on the presentation of an indictment against Hobbs which report the Lord Chief Justice described as "a report that seems to me upon the whole and subject to certain limited exceptions to be accurate and fair of a charge which ought not to have been delivered in the form in which it was delivered." No such description can be applied to the present case in which to use the language of Sim J. it must have been evident "to any intelligent reader" that the newspaper was commenting on the demeanour of the witness in giving her evidence.

AVOCAT.

OBITUARY.

The profession generally will regret to learn of the death at the age of 63 years of Mr. Richard Alfred Dawson Welsh, senior partner in the firm of Messrs. Welsh, McCarthy, Beechey and Houston of Hawera. Mr. Welsh was the son of the late Rev. Ralph Dawson Welsh, a member of an old-established family in Ulster. He arrived in New Zealand at the age of 16 years, was admitted in 1888 and thereafter practised at Hawera. For many years Mr. Welsh held the office of solicitor for the Hawera Borough and County. He was also Government appointee on the Hawera Power Board since its inception.

Death gave our deceased friend little warning of his grim approach. Mr. Welsh was engaged upon his papers last Thursday when his typistes noticed that he was coughing in a strange manner. There was scarce time to call in medical help when an apoplectic seizure overpowered him. Temporary relief was afforded but death supervened later in the evening.

Easy to get on with and of a genial disposition Mr. Welsh was uniformly respected and esteemed by his partners, his office staff, the members of the profession with whom he did business, and the public generally. In his younger days he was a successful athlete. Over twenty-five years ago he established a home in what was then a bare and uninviting policy and thereafter spent his time beautifying and adorning it.

LAW JOURNALISMS.

MONEY PAID BY MISTAKE.

Our readers may usefully note in the margin of their **Smith's Leading Cases** (12 Edition, Vol. II, p. 426, cp. **Halsbury's Laws of England**, Vol. XXI, under "Mistake," Part VI, p. 55 et seq.) a new application of the principle in **Chambers v. Miller** (13 C.B.N.S. 125) to other circumstances. The decision is that of Roche J. in **Barclay's Bank, Ltd. v. W. F. Malcolm & Co., Ltd.** ("Times," 20th ult.) by which was disallowed a claim for repayment of money alleged to have been paid under a mistake of fact. Roche J. refused to reiterate the general principles as to "mistake," protesting that an adequate definition was already to be found in the many authorities; but he could not help but deliver an interesting and noteworthy judgment. Plaintiff's foreign customers sent them telegraphic instructions to pay defendants £2000 and followed those instructions by a letter of insrtuctions to pay defendants £2000. Plaintiffs, mistakenly supposed that two separate sums of £2000 were intended, paid £4000 in all. In fact, one payment of £2000 was ordered, the letter being confirmation of the telegram. Meanwhile the indebtedness of the foreign customer to the defendants at all material times exceeded the money received by the defendants from the Bank. Roche J. arrived at his conclusion by a process of elimination: "It was not contrary to good conscience that the defendants should keep this money; the mistake was not in any way due to them; the mistake which was made concerned only the plaintiffs and the foreign customers by whom the plaintiffs were instructed; and it was not a mistake as to the liability of one person to pay or the right of another person to receive. The nearest authority appears to be **Chambers v. Miller** (sup.). In his view this first points gave a good defence to the action." This is the second important decision we have had on the subject this year: cp. **R. E. Jones, Ltd. v. Waring & Gillow, Ltd.**, p. 271 above.

(6/6/25.)

DISCRETION OF JUSTICES IN AWARDING MAINTENANCE TO WIFE.

Attention should be drawn to an important decision of a Divisional Court in **Stephenson v. Stephenson** ("Times," 10th inst.) with regard to the discretionary powers of justices to award maintenance to a wife under Section 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895. According to that provision, the justices may order the husband to pay "such weekly sum not exceeding £2 as the Court shall, having regard to the means, both of the husband and the wife, consider reasonable." In the well-known case of **Cobb v. Cobb** (1900, p. 294) the Court, while not wishing to lay down any hard and fast rule, was nevertheless of opinion that Courts of Summary Jurisdiction ought to be guided by the principles and practice upon which allotments of alimony were made in cases of judicial separation in the High Court, and accordingly to allot to a wife who had no means of her own, and who had no children to support, one-third of the husband's income, or if she had means apart from her husband, such sum (if necessary) as was sufficient to bring her income up to one-third of the amount of the joint incomes, subject, of course, to the maximum provided by Section 5 (c) of the Act. That the justices, however, have a wider discretion in every case, and are at liberty to disregard these rules, appears to be amply demonstrated by the above-mentioned decision in **Stephenson v. Stephenson**. In that case the justices awarded the maximum amount of £2 per week, notwithstanding that that sum was more than one-third of the husband's income, without even taking into account the income of the wife. The Divisional Court, however, refused to disturb the order of the justices on the ground that the circumstances were exceptional, and that there were grounds on which the justices, in the exercise of their wider judicial discretion, might have made the order appealed from. The comments of the President on **Cobb v. Cobb** are noteworthy. In referring to that case the learned Judge said that "regard must be had to two facts, (i) that the Court was careful to point out (i.e., in **Cobb v. Cobb**) that it did not lay down any hard and fast rule, and (ii) that he rules with regard to alimony and maintenance applied by the Ecclesiastical Courts were brought into operation with regard to persons of fixed incomes and usually of some wealth, and the Court apportioned that income and that wealth in ordinary cases so as to provide one-third of the joint incomes for the maintenance of the wife. But the Ecclesiastical Courts were bound themselves by a hard and fast rule."

(13/6/25.)

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