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.

TUESDAY, APRIL 13, 1926.

This issue brings Mr. Stevenson's thoughtful article on Mistaken Identity to a close. Mr. Stevenson has prepared his subject very thoroughly and has stablished a very strong case against some present-day methods with regard to identifying an accused person with the person who committed the offence.

Apart from the Beck and the Sheppard cases every Barrister who has practised in the Criminal Courts or even in witness actions will know from his experience the weakness of evidence of identity, due largely to the fact that few persons observe accurately. Mr. Stevenson's article should serve as a valuable aid to the young Barrister who finds himself faced by a string of witnesses who have all come to identify his client.

So long as we have the Bench taking a strong and definite stand in insisting on only the fairest means being adopted in identifying accused persons the chances of injustice creeping in will be minimised. The slightest slackening however may mean the convicting of an innocent man.

COURT OF APPEAL.

Sim, J.
MacGregor, J.
Alpers, J.

March 22, 31, 1926.

CHAPMAN v. CHAPMAN.

Divorce—Petitioner guilty of adultery—subsequent condonation—Agreement for separation—Whether previous adultery though condoned a bar to relief—Section 4 of Amendment Act of 1920—Whether applies when agreement made out of New Zealand.

This was an appeal from Stout C.J. and was allowed. In June 1917 petitioner committed adultery. Under pressure from her family wife fully condoned offence some months later. Parties resumed cohabitation but wife suspicious of husband and deed of separation signed October 1917. In 1925 petitioner obtained a decree nisi from Stout C.J. who based it on the fact of his previous adultery having been condoned. The wife appealed.

Sir John Findlay, K.C., and **Perry** for appellant.
Gray, K.C., and **D. M. Finlay** for respondent.

THE COURT allowed the appeal. In lengthy reasons Alpers J. after setting out the facts at length, said: The judgment, therefore, raises the important question whether the defence of condonation, which is open to a respondent charged with marital misconduct, is equally available to a petitioner as an answer to a respondent who pleads the special defence created by the proviso to Section 2 (1) of the Act of 1921-22. That proviso is in these words:—

> "Provided that if upon the hearing of a petition under this section the respondent opposes the making of a decree of dissolution, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall not make upon such petition a decree for the dissolution of the marriage."

Counsel for respondent in this appeal urge strenuously that there was in this case complete condonation. This means "a blotting out of the offence imputed so as to restore the offending party to the same position as he or she occupied before the offence was committed." (**Keats v. Keats and Montezuma** 1859 1 S. & T. 334 at p. 346.) "Such a complete obliteration of the condoned offence that it cannot be used for any purpose whatever (unless subsequently revived)." The party forgiven becomes rectus et integer." (**Anichini v. Anichini** 1839 2 Curt. 210.)

If this doctrine in its full application were applicable as an answer to this statutory defence, where the Court has to satisfy itself whether the "separation was due to the wrongful act or conduct of the petitioner," startling results would follow. Assume, for example, this set of facts: A wife suddenly discovers that her husband has been engaged in adulterous intercourse of long duration; in the interests of her children, perhaps from love of her erring husband, on the urgent entreaties of her family, possibly in obediance to the teachings of her religion, she forgives him and resumes cohabitation. In a month, in a week perhaps, the first fine fervour cools; the memory of the other woman persistently obtrudes itself; and the wife finds she cannot sustain her altruistic attitude. She discovers that her forgiveness, sincere at the moment, was but a quixotic gesture. The husband's conduct since condonation has, it may be granted, been exemplary; there is no suggestion of misconduct that might revive his past transgression. But the wife is unable to forget the past or continue the joint life and they agree, with sorrow perhaps on both sides, to live apart.

If that husband after the lapse of three years came to the Court to petition for a dissolution of the marriage upon the ground of that separation, and his wife, refusing to be put in the position of a divorced woman, opposed the petition, could it conceivably, in such circumstances, be suggested, still less "proved to the satisfaction of the Court", that the separation was not due to the wrongful conduct of the petitioner?

The proposition so stated carries its own refutation. If in such a case the Court were really coerced by the doctrine of condonation and bound to "blot out" and "obliterate" the adultery from its consciousness, the only "effective cause" that could be suggested for the separation between the spouses would be a capricious whim.

It is easy of course to imagine a case of a very different character: where the reconciliation has lasted for a long time and a normal and affectionate relationship has been re-established, perhaps for years. If the spouses then, for reasons altogether dissociated from the condoned offence, agree to separate and after three years the husband brings suit, the wife, if she opposed it on the ground of the long past transgression, might fail. But this would not be because she had condoned the transgression; it would be because, in the circumstances, that transgression was not, in fact, the effective cause of the separation.

It was contended on behalf of respondent that there was no reason, either on principle or authority, why the doctrine of condonation should be limited in its application and not be pleaded in bar of the statutory defence created by the proviso. The defence, like the ground of divorce in respect of which it is raised, is the creation of a statute of recent date, and the question of the application to it of the plea of condonation, has not till now come before the Courts. But I have found some observations of Lord Stowell in **Beeby v. Beeby** (1799 1 Hagg. E.R. 793) which appear to me to furnish a clear principle for the distinction here made:—

> "What is the effect of condonation? In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released; but here the plea in bar is compensatio; and condonation is not in bar of the action, but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act which will bar the remedy will operate on the other side. And unless it is an universal rule that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court?"

This is only an earlier application in a divorce suit of "a notion not strange to our law that the Court should refuse its aid to one who does not come into it with clean

hands. (Lord Herschell in **MacKenzie v. MacKenzie,** 1895 A.C. 384 at p. 390.) In the New Zealand case of **Newell v. Newell** (28 N.Z.L.R. 857) Williams J. held that in the desertion clause (The Divorce and Matrimonial Causes Act 1908 Sec. 21) the Legislature, in the words "without just cause," expressly adopts the "clean hands" doctrine.

It appears clear, therefore, that having regard to the language of the proviso the plea of condonation is not a bar to this special defence.

This view of the law may, no doubt, be productive of hardship in many cases. It is perhaps to be regretted in the present case that, in the interest of both, the wife did not cross-petition and so, having vindicated her right not to be placed in the position of a divorced woman, nevertheless on her own motion set free both herself and her husband from the intolerable burden of a relationship that has been for nearly nine years past but the shadow of a marriage.

In the course of the argument, counsel for appellant submitted that inasmuch as the Deed of Separation was entered into in New South Wales, while the parties were domiciled there, it was not a "deed or agreement of separation in full force and effect for not less than three years", within the meaning of Section 4 of "The Divorce and Matrimonial Causes Amendment Act 1920." Alternatively, counsel submitted that it had not been in force "in New Zealand" for that period, inasmuch as less than three years intervened between the arrival of the petitioner in this Dominion and the filing of his petition.

On the view already arrived at, it is not necessary for the determination of the appeal to decide the point. But as the question has not previously come before the Court of Appeal it is desirable and convenient to express an opinion upon it.

In **Jackson v. Jackson** (1923 N.Z.L.R. 608) this Court decided that an order made under the Summary Jurisdiction (Married Women) Act 1895 by a Police Magistrate sitting at Hull was not "a separation order made by a Stipendiary Magistrate or by a Resident Magistrate" within the meaning of the section; and that the section applies only to decrees for judicial separation or separation orders made in New Zealand. But this decision is based partly upon the special words of the section referring to "a Stipendiary Magistrate or a Resident Magistrate" and also upon the broader ground of jurisdiction. "I take it," says Salmond J. in the course of his judgment, "that this" (the words 'is in full force and has so continued for not less than three years') "means that the order must be in force in New Zealand. I am not aware of any authority for suggesting that an order made in England by a Court of Summary Jurisdiction for the separation of husband and wife will be recognised outside of England as having any extra-territorial operation so as to affect the matrimonial status or the mutual rights and obligations of the parties."

These considerations have, of course, no application to a contract between the parties. It is true, no doubt, that when the wife signed this Deed of Separation in Sydney in 1917 she could not know that in 1920 the Legislature of New Zealand would pass an enactment making such an agreement a ground for divorce if in full force and effect for three years; nor could she anticipate that her husband would remove himself to this Dominion and there acquire a domicil enabling him to take advantage of the Act. But there seems to be no reason on principle why the locus contractus should be of importance in an agreement between parties affecting their own matrimonial status. There is nothing exceptional in the position that a divorce may be granted in one jurisdiction on the ground of acts done in another where these acts are not, or are not alone, recognised as grounds for divorce.

I am of opinion, therefore, that this appeal should be allowed with costs on the highest scale.

Solicitors for appellant: **Finglay, Hoggard, and Morrison,** Wellington.

Solicitors for respondent: **D. M. Finglay** and **Moir,** Wellington.

Sim, J.
Stringer, J.
MacGregor, J. March 15, 31, 1926.

COMMISSIONER OF TAXES v. DOUGHTY.

Income tax—Sale of partnership to company including stock in trade—Partnership value of stock in trade less than company's estimate—Whether difference is profit derived from business—Practice—Notice of appeal wrongly intituled—Special leave—R. 19.

This was an appeal from Stout C.J. and was allowed. We take the relevant facts from the reasons of Sim J. who delivered the judgment of the Court.

"In the year 1920 the respondent and one Arthur John George were carrying on business as warehousemen and general merchants in partnership in Wellington under the style of "George and Doughty." By an agreement in writing bearing date the 25th day of June 1920 they agreed to sell their business to George and Doughty Limited, a company incorporated under the Companies Act. The sale included the goodwill and stock-in-trade of the business, and all the other partnership property. Part of the consideration for the sale was the sum of £76,000 which was satisfied by the allotment of 60,000 fully paid up ordinary shares and 16,000 preference shares. The residue of the consideration was the payment by the company of the debts of the vendors in connection with the business. The sale was to take effect as from the 19th day of January 1920, and the assets of the partnership including the stock-in-trade were transferred to the Company.

In their income tax return for the year ending the 19th of January 1920 George and Doughty shewed their stock-in-trade on that date as being of the value of £43,357 15s. 10d. The company treated this stock-in-trade as being worth £58,383 6s. 10d., and this was stated to be its value on the 20th of January 1920 in the income tax return furnished by the respondent as managing director of the company. The appellant treated the difference between the two sums viz £15, 026 as a profit derived from the business of the partnership, and caused the respondent to be assessed for income tax in respect of the sum of £6010, being his proportionate share of such difference.

Stout C.J. disallowed the Commissioner's assessment.

Fair, K.C. (Solicitor-General) for respondent.
Myers, K.C., and **Smith** for respondent.

SIM J. in delivering the judgment of the Court said: The question to be determined on this appeal is whether or not the decision of Stout C.J. was right. The view taken by the learned Judge was that as the sale of the stock-in-trade formed part of a transaction which put an end to George and Doughty's business, and was not made in the course of carrying on that business, any profit on such sale was not a profit derived from a business within the meaning of Section 85 of the Land and Income Tax Act 1916. He thought that the case was not governed by the decision in the case of Anson v. **Commissioner of Taxes** (1922) N.Z.L.R. 330; G.L.R. 49, and that he was free, therefore, to act on the view taken by the High Court of Australia in the case of **Commissioner of Taxation for Western Australia v. Newman,** 29 Com. L.R. 484. It appears to us that the case is really governed by the decision in **Anson's case,** and that the learned Judge should have followed and applied that decision, instead of adopting the view taken in the Australian case. It was decided by this Court in the case of **The Commissioner of Taxes v. Miramar Land Company,** 26 N.Z.L.R. 723 that a profit made by a land company on the sale of all its property in one transaction which, in effect, put an end to its business, was a profit derived from the business on which income tax was payable. That decision justifies the statement made in the judgment in **Anson's case** that it "does not make any difference whether a taxpayer's stock-in-trade is sold progressively in the normal course of business or is sold all at once by way of clearing sale or otherwise in connection with a transfer or a winding up of the business. Whether his profit is derived from a single sale of all his stock-in-trade at once, or from repeated sales in the ordinary way of his business, his profit is taxable income, assessable accordingly." In **Anson's case** the sale by Dr. Anson of his station first and of all his sheep in the following month was just as much a putting an end to his business as a pastoralist as was the sale in the present case of George and Doughty's business. The fact that the termination of the business was effected by one transaction instead of two as in Anson's case cannot make any difference in the result. The purpose of the business was to sell the stock-in-trade at a profit. A profit made on the sale thereof is, we think, a profit derived from the business, whether the sale be made while the business is being carried on in the ordinary way or while it is being wound up. This conclusion seems to be the necessary result of the decisions in the two New Zealand cases already referred to. **Anson's case** was considered by this Court in the case of **Macfarlane v. Commissioner of Taxes** (1923) N.Z.L.R. 801, and was distinguished on the ground that the profit sought to be taxed in **Macfarlane's case** as income was, as Mr. Justice Stringer put it in his judgment, merely an estimated or potential profit, which had not been realised. In the pres-

ent case the profit has been realised in the shape of the fully paid up shares in the company allotted to the respondent.

The appellant, of course, has to establish what was the profit on the sale of the stock-in-trade. The agreement for sale did not make any apportionment of the consideration. In the balance sheet prepared for the flotation of the company stock and goodwill were put down at £78,383 6s. 19d. After the sale George and Doughty agreed to treat £20,000 of this as being for goodwill, thus leaving £58,383 6s. 10d. as the consideration for the stock-in-trade. This was treated by the company as the value of the stock, and in the closing entries made in George and Doughty's books the sum of £15,025 8s. was treated as the profit made on the sale of the stock. This entry is sufficient to establish against the respondent that this sum was the profit on the sale of the stock-in-trade.

The result is that the appeal is allowed and the order made by the Magistrate confirming the assessment and allowing costs restored. The respondent is ordered to pay £25 for costs in the Supreme Court and the costs of the appeal in this Court on the highest scale.

Solicitors for the appellant: **Crown Law Office**, Wellington.
Solicitors for the respondent: **Morison, Smith & Morison**, Wellington.

Skerrett C.J. March 24, 31, 1926.
Sim J.
MacGregor **J.**

HAYES v. MITCHELL, et al.

Rating—Act of 1908 ,S. 73—Separate judgment for rates due on each property—Whether essential—Magistrate's Court—Joining causes of action—Power to enter separate judgments—Dividing judgment—Not allowable—Practice —Court of Appeal—Appeal from part—Power to review whole judgment.

This was an appeal from Alpers J. and was allowed. In his reasons the Chief Justice, who delivered the judgment of the Court remarked that the facts had not been quite accurately placed before Alpers J. at the hearing in Nelson.

The facts were that two judgments were obtained by the Collingwood County Council for two sums of money totalling together to the sum of £147/13/- against Garden Boyd Watson, the owner of eleven separate rateable properties in respect of rates payable in respect of such properties. Although the plaint in each case showed the amount of rates claimed against each property one judgment was entered against Watson for the total amount of the rates and the costs of the action. The County Council subsequently took proceedings under Section 73 to recover part of the amount of the two judgments by sale of six out of the eleven rateable properties. It forwarded to the Registrar of the Supreme Court a certificate certifying that under the provisions of the Act judgment was given in the Magistrate's Court for the sum of £147/13/0 against Watson as the owner of the eleven separate rateable properties described in a schedule to the notice. It will be seen that this certificate related to the total amount of the two judgments and to the rate due in respect of all the eleven rateable properties. The Registrar of the Supreme Court then gave notice under sub-section 2 to each person interested in each of the six rateable properties that the property would be sold or leased by public auction under the provisions of the Act after six months from the date of the notice unless the amount of the judgment for £147/13/0 obtained against Watson, together with certain interest and costs, should be paid prior to such sale or lease. The notice had appended to it a schedule not referred to in the body of the notice setting out the rates actually due and recovered by the judgment in respect of the particular property in respect of which the notice was given. It will be seen that the notice related to the total amount of the judgments and required such amount to be paid prior to the sale or lease. But the intention of the Registrar, though insufficiently effectuated, was to give the notice as applying only to that part of the rates recovered in the two judgments which were due in respect of the property as to which the notice was given and a proportionate part of the total costs awarded in the judgment. The two judgments were thus intended to be treated as one and were treated in the same manner as if they contained separate judgments for the rates payable in respect of each of the six rateable properties, and a proportion of the total costs. The rateable properties were advertised for sale in six lots but before the sale the rates payable in respect of the property included in lot 4 were paid, and that lot was withdrawn from sale. The first lot offered at the sale realised £16, being slightly more than the rates due on that lot. The second lot realised the sum of £520, and this was more than enough to pay the whole of the judgment as well as the rates due subsequently to the judgments in respect of all the six properties. The Registrar was then faced with the question whether he was bound to apply the surplus sale proceeds in payment of the rates recovered in respect of the remaining two lots, or whether he should proceed with the sale of the remaining lots. He decided on the latter course and the three remaining lots were sold at the sale in each case at a price sufficient to pay the rates and costs in respect of that lot.

Appellant in person.
Glasgow for Mitchell.
Samuel for Collingwood County Council.
Fell for Hilda Rogers and others.
Hanna for Brown.

SKERRETT C.J. said in allowing the appeal it is clear that the Court is entitled on this appeal to review the whole of the declaratory order although the appeal is limited to a part only of the decision. Under Rule 5 of the Court of Appeal rules, the powers of review of the Court of Appeal may be exercised by it notwithstanding that a notice of appeal may be that part only of the decision may be reversed or varied; and its powers may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision.

As the question involved in the appeal is of some public importance, we think it proper to review the whole decision under appeal and to give our opinion on the interpretation of Section 73. We think that if it is desired to invoke the special statutory remedy given by Section 73 there must be a separate judgment for the amount of the rates due in respect of each rateable property which it is sought to sell under that remedy. It appears to us that this requirement is the basis which underlies the procedure laid down by the statute. Without a judgment against each rateable property it is impossible to comply with the requirement of the Act both as to Certificate and Notice; and without it the whole procedure would produce both absurd and unjust consequences. For example, had the proper course been taken the dilemna which faced the Registrar when lot 2 realised sufficient to pay the whole of the rates could not have arisen; and the procedure of the statute contemplated that each rateable property should be sold for the purpose only of satisfying a judgment in respect of rates payable in respect of it.

It does not follow that a separate summons must be issued for the rates separately due in respect of each rateable property. Rates due in respect of several rateable properties may be joined in one summons as separate causes of action; but if it is intended to invoke the special remedy of Section 73, it is essential that there should be entered up separate judgments in respect of such causes of action so that there will be a separate judgment for the rates due in respect of each rateable property. We think the Magistrate's Court has jurisdiction to enter separate judgments in respect of each cause of action joined in one plaint and summons. Indeed without this jurisdiction the Magistrate's Court would be unable to perform its duty of adjudging upon different causes of action joined in the one action.

Apart altogether from the question which we have to determine it is clear that the proceedings of the County Council and the Registrar were wholly irregular. The notice was given in respect of two judgments described as one; and the Certificate split up and divided the total of the two judgments among six of the eleven properties according to the rates payable in respect of such six properties and according to an apportionment of costs made by the Registrar. It is clear that the Certificate does not follow the judgments obtained against the rateable properties and the notice does not follow the certificate. Apart from this the Registrar clearly had no authority to split up and divide the judgments as he did.

It is to be observed that it is well settled that a judgment creditor is not entitled to divide his judgment and issue several executions upon it. In **Rothschild v. Fisher** 1920 2 K.S. 243 at page 253 Lord Sterndale M.R. said:—

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"I think it is in accordance with **Forster v. Baker** 1910 2 K.B. 636 to which my attention has been called by Scrutton L.J., where this Court held that as the original creditor could only issue a single execution upon his judgment and could not split up the judgment debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment debt a right which he did not himself possess".

We must therefore allow the appeal.

The Court held that the sales at auction by the said Frank Mitchell as Registrar of the Supreme Court at Nelson pursuant to Section 73 of "The Rating Act, 1908", on the 31st day of January 1925, of Section 1, Block VI. Pakawau Survey District and one part of Section 12 Block XVI. and 30 Block VI. Pakawau Survey District to the said John Patrick Hayes and Harold Leon Harley respectively were not valid and effectual sales and the Registrar ought not to complete the same; and that the subsequent sales at auction by the said Frank Mitchell pursuant to the said Section 73 of "The Rating Act, 1908", on the same date, of Section 58 BlockVI. Pakawau Survey District to the said Harold Leon Harley of Part Section 11 Block XVI. Pakawau Survey District to Jane Maginnity and of Section 13 Block XVI. aforesaid to Harold Leon Harley were not valid and effectual sales and the Registrar should not complete the same.

SUPREME COURT.

Stringer J. Feb. 12, March 2, 1926. Auckland.

RE SEC. 20 ARBITRATION ACT, 1908
FRANKLYN ELECTRIC SUPPLY & TRADING CO. LTD. v. CLIMIE AND OTHERS.

Arbitration—Purchase of company's business and undertaking—Price—Principles for ascertaining same.

Arbitrators selected to ascertain the price to be paid by the Franklin Electric Power Board to the Franklin Electric Supply etc. Co. for the purchase of the Company's undertaking and business failed to agree on the principle to be applied in ascertaining the price. They stated a case for the Court. In the option for purchase para. 1 read as follows: "1. (a) The undertaking and business of the Company as carried on by it under the said Deed and under its Memorandum and Articles of Association but not including its Ironmongery and Electrical Trading business; (b) all and singular (as a going concern or in situ) all plant mains machinery lines poles standards fittings goods and chattels the property of the Company and used exclusively in connection with or for the purpose of generating and supplying electricity under the said deed (including the Power House lands and buildings the property of the Company situated at Fernleigh and that portion of the land and buildings of the Company for a generating room and Gas Producer plant with a frontage of approximately thirty three feet (33ft.) by a depth of approximately one hundred and twenty feet (120 ft.); (c) any other rights powers privileges and assets not hereinbefore specified and used by the Company for the purpose of supply electricity and generally complying with and carrying out the provisions of the said Deed and the several licenses therein referred to." Paragraph 3 of the Option provides that the price to be paid shall be fixed by valuation in the ordinary way, but expressly declares that "in making such valuation no account whatever shall be taken of Goodwill."

Towle for plaintiff.
Hogben for Climie.
Richmond for Brown.
McVeagh and **Mason** for Power Board.

STRINGER J. answered the following questions in the affirmative, and question 2 in the negative:

1. Is the valuation referred to in the Option to be made on the basis that the property mentioned in this subclause is to be valued on the present day value of the various assets mentioned therein at the time of valuation, such value to be arrived at by taking the value thereof:—

(a) In the case of fixed machinery and other assets attached or annexed to land or buildings at the present day cost thereof delivered to the sites where the same now respectively are, plus the cost of erection and the cost of all foundations and fixtures necessary to make the same fit for the purpose for which they are respectively intended or used—less such depreciation owing to wear and tear thereof as may be just, fair and usual—if not, on what basis is the valuation to be made?

(b) In case of other assets referred to in such subclause (excepting realty) are the same to be valued on the basis of the present day cost in the place where the same may be less in the case of any assets which may have been used a just, fair and usual allowance for depreciation. If not, on what basis is the valuation to be made?

(c) In the case of land and buildings thereon, is this to be valued on the basis of its cost and present value as land and buildings used for the purpose of the business of generating and supplying electricity, irrespective of any possibility that the purchasing Board may or may not consider the said land and buildings or any part thereof unsuitable for its purpose, and may contemplate not using or altering or demolishing the same or part of the said buildings.—If not, on what basis is the valuation to be made?

2. Is the Company entitled to any payment under Paragraph 1 (c) of the option "for the rights, powers, and privileges conferred on it by the licenses and deed of delegation thereof referred to in the said Deed of Option? If so, is it entitled to payment on the basis of the cost thereof to the Company, such cost including legal expenses, cost of the formation of the Company or any part of such expenses and costs? If the Company is not entitled to such expenses and costs, on what basis is the payment to it to be assessed?"

The goodwill appeared to the learned Julge to include the licenses without which the undertaking could not be carried on: **Rutter v. Daniell** 30 W.R. 724 at 801.

The profits or absence of profits could not be allowed to affect the value of the assets.

As the Board had bought the undertaking as a going concern interest should be allowed on capital expenditure during construction and erection and for such period as seemed reasonable. **Stockton v. Kirkleatham Local oBard** 1893 A.C. at 449 per Lord Herschell.

Ostler J. Feb. 23, 24, 1926.
Nelson.

IN RE JONES, A BANKRUPT.

Bankruptcy—Application for discharge—Principle on which application considered.

This was a motion for an order discharging an order in bankruptcy. The facts are not material for the point noted. There was objection to the granting of the order and the learned Judge commented on the principles to be considered in this kind of application.

Kerr for Jones in support.
Rout contra.

OSTLER J. made an order for unconditional discharge. In a written judgment he said, after reciting the particular facts, the intention of the Legislature in enacting our Bankruptcy Laws was that a bankrupt, upon giving up the whole of his property should, in the absence of misconduct on his part inducing the bankruptcy, be a free man again, able to earn his livlihood and having the ordinary inducements to industry: **re Gaskell** (1904) 2K.B. at p. 482 per Vaughan Williams L.J. Moreover, where there is no evidence that the bankrupt will ever have after acquired property, prima facie the Court ought not to fetter him by making his discharge subject to the condition that he consent to a judgment: **re Bullen, ex parte Arnaud** (5 Morr 243). It is not in the interests of the community to discharge a bankrupt by granting an order of discharge subject to conditions which impose such a burden upon him that he can have no hope of bettering his condition; and in considering an application for discharge the Court will have regard, not to the interests of the creditors alone, but also to the interests of the community: **re Badcock** (3 Morr. 138). In this case, as I have said, there is no evidence that the bankrupt is ever likely to have after acquired property. For these reasons I must decline to make the discharge conditional on the bankrupt consenting to a judgment being entered against him, and I am prepared to grant his discharge unconditionally.

Discharge granted accordingly.

Solicitor for bankrupt: **J. R. Kerr**, Nelson.
Solicitors for opposing creditor: **Rout & Milner**, Nelson.

Skerrett C. J. Mar. 6, 10, 1926.
Napier.

HARRIS v. HARRIS.

Divorce—Permanent maintenance—Order—Subsequent application for increase—Whether Court has jurisdiction to make order.

The petitioner, the husband, obtained a decree for dissolution of marriage from his wife on the grounds that the parties had been separated by mutual consent for at least 3 years. The respondent was given custody of the child of the marriage, Inez May. On 13th June, 1925, on respondent's application with petitioner consenting an order of the Court was made directing the petitioner to pay respondent 30s a week for her maintenance and 12s for the child's maintenance. The latter till the child reached 16 years of age.

The respondent now asked for an increase of maintenance for herself on the ground that she had fallen into ill-health and the husband's means were increased.

Rogers for respondent in support.
Lusk for petitioner to oppose. The Court has no jurisdiction to increase the maintenance.

SKERRETT C. J. in holding that the Courts in New Zealand had no jurisdiction to increase the order said the order for the permanent maintenance of the wife could only have been thought to have been authorised under Section 42 of the Act. That section authorises the Court where a decree for dissolution of marriage has been obtained against a husband who has no property to make an order on the husband for payment to the wife during their joint lives of such monthly or annual sum for her maintenance and support as the Court thinks reasonable. This section did not justify the order for permanent maintenance to the wife because it applies only where there is a decree for dissolution of marriage against a husband. In the present case, as I have said, the decree was made in favour of the husband, and at his suit. Sub-section (2) of this section is also inapplicable. The order for permanent maintenance was therefore made without jurisdiction, and can only have whatever effect it may be entitled to as a consent order.

The learned Chief Justcie said that the N.Z. Courts had no jurisdiction to increase an order for permanent maintenance. The jurisdiction given the Court by Section 42 was purely statutory. No jurisdiction relating to the matter was inherited by statutory devolution from the Ecclesiastical Courts. Section 42 gave no jurisdiction to make an order increasing the order. The learned Chief Justice continued:—

Until the year 1907, the position was precisely the same in England. It is clear that there the jurisdiction to make orders securing the wife a gross sum of money, or such annual sum of money, for any term not exceeding her own life as the Court should deem reasonable, was purely statutory and depended upon two statutory provisions, namely, the power to make orders for the maintenance of a divorced wife by deed or instrument granted by Section 32 of the Act of 1857—being the equivalent of our Section 41, and Section (1) of the Act of 1866, being the equivalent of our Section 42.

The English divorce rules carefully distinguish between, on the one hand permanent alimony granted to the judicially separated wife, and other forms of what is known as permanent alimony, and on the other hand orders for maintenance and periodical payments made by virtue of the statutory provisions. This distinction is still preserved in the divorce rules of 1924—see Rules 57 to 64 relating to permanent alimony strictly so called, and Rules 65 to 70 relating to maintenance and periodical payments ordered under the statutory authority. These rules retain a rule, No. 63, which is in the same language as our Rule 88, to which reference will be made. In England the question whether there is jurisdiction to increase an order for payment of maintenance made upon a husband has never been the subject of express decision; but the subject is referred to in the judgment of Windley C. J. in the Court of Appeal in the case of **Watkins v. Watkins** 1896 P. at PP. 226-227. In the course of a discussion in that case, he says:—

> "The question which has now to be decided, and decided for the first time, turns simply on the true interpretation and effect of Section 1 of the Act of 1866. The object of the section is plain; it is to enable the Court to order divorced husbands who cannot make settlements to maintain their divorced wives out of their earnings. The payments to be made to the divorced wife are to be for her maintenance and support." This language points to a purely personal allowance. Such allowances are by no means unknown to the law. Alimony is one instance. An officer's full or half pay is another. It is true that in a case like this the Court has no power to increase the allowance once made, and there is good reason for this; for, the marriage bond being at an end, there is no reason why the woman's allowance should increase with her late husband's means. On the other hand, if he cannot pay the allowance fixed by the Court, the Court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether."

Although these observations are obiter they nevertheless fully justify the opinion which is created by merely reading the section that the jurisdiction referred to did not in fact exist. The law in England has been altered by the Act of 1907 (7 Ed. VII Cap. 12 Sec. 1 sub-sec. 2 (b)) where it is provided that where the Court has made an order for permanent maintenance and is satisfied that the means of the husband have increased, the Court might if it thinks fit increase the amount payable under the order. No such statutory provision is in force in New Zealand.

In my opinion there is no jurisdiction in New Zealand to increase an order for permanent maintenance made under Section 42. That section if it is examined gives power to the Court if the husband should afterwards become less able to make the payments, to discharge or modify or temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and to again revive the same order wholly or in part as the Court thinks fit. There is no power given by the section to increase an order for permanent maintenance made under its authority. If our divorce rules are examined it will be seen that they make a distinction between permanent alimony and orders for permanent maintenance. This will be seen by comparing Rules

87, 88 and 89 with Rules 91 and 92. Rule 88 provides that a wife might at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of alimony allotted by reason of the increased faculties of the husband or the husband may file a petition for diminution of the alimony allotted by reason of reduced faculties.

I think it is clear that in the absence of a statutory jurisdiction to increase the amount of an order for permanent maintenance made under Section 42, Rule 88 applies only to permanent alimony strictly so called granted to the wife in accordance with the old ecclesiastical practice.

In my opinion therefore so far as the application to increase the permanent maintenance of the wife is concerned the Court has no jurisdiction to grant an increase.

With respect to the order providing for the maintenance of the child of the marriage that order must have been made under the authority of Section 45 of the Act.

It is clear that Section 46 gives jurisdiction to the Court from time to time to vary the order for maintenance and this section and not the last proviso to Section 42 is applicable to the present application. The claim however for an increase is in no way directed to the maintenance of the child; and no sufficient material on this subject has been brought before the Court. No order therefore can at present be made upon this application. But the parties are to be at liberty if upon consideration they think proper so to do to renew their application for an increase of the maintenance allowance made in respect of the child, Inez May Harris. There will be no order as to costs.

Solicitors for Petitioner: **Kennedy, Lusk & Morling,** Napier.
Solicitors for Respondent: **Hall Skelton & Skelton,** Gisborne.

Alpers J. Feb. 27, March, 1926.
Wellington.

HEAP v. GREEN.

Slander—Communication to husband and employer of plaintiff—Privilege and justification pleas—Practice as to pleading justification—Particulars—Improper pleading.

Plaintiff claimed damages for slander by defendant to her employer imputing dishonesty in her employment and to plaintiff's husband imputing unchastity and dishonesty. The defendant pleaded a denial or alternatively qualified privilege or justification. On a summons to strike out the plea of privilege and for further particulars as to justification.

Dunn for plaintiff in support.
Mazengarb for defendant contra.

ALPERS J. said: Privilege is pleaded in these words. After alleging her honest belief in the words, if they were in fact used, the defendant says she "felt it her duty to inform the plaintiff's husband thereof. The defendant did so inform the plaintiff's husband of what she had seen and heard, but as the plaintiff's husband declined to speak to the plaintiff about the matter the defendant (in pursuance of an intimation she had made to the plaintiff's husband in that connection) gave the information in confidence to one Mr. Richards (whom the defendant found to be in charge of the business of Macduff's). In so speaking to the plaintiff's husband and to the said Mr. Richards the defendant acted under a sense of duty in the bona fide belief that the words used by her were true, and further acted without any malice towards the plaintiff. Such words as she used in conveying the above information were published only to the plaintiff's said husband and to the said Mr. Richards, who each had a duty and interest in the matter. The defendant pleads that under such circumstances the publication of any words used by her is privilege."

Now "qualified privilege"—so as Spencer-Bower prefers, as I think, with reason, to call it "defeasible immunity"—attaches to defamation in any case in which as regards the circumstances and occasion of the publication, the party defaming is under a duty (whether legal social, or moral) to make, or has an interest (being a legitimate interest) in making, the communication, and in which the person to whom the communication is made has a corresponding interest or duty. "Duty" means that which a normal person would recognise as a duty in the circumstances of the particular case.

Counsel for defendant points out that the duty may be one of "imperfect obligation"; the tendency of the Courts is to extend the scope of such duty; and so, he suggests the "duty" his client felt to inform a husband, whom she did not know, that his wife was misconducting herself with another man, and to tell an employer, to whom she was a stranger, that his saleswoman was dishonest, is the kind of "social or moral duty" on which a defence of defeasible immunity may be based. In the cases I have examined I have, as I expected, found no trace of any tendency to encourage such a very disagreeable conception of "duty"; if such a tendency did exist it would hasten the reign, not of the righteous which all men pray for, but of the self-righteous which most men, one hopes, abhor. But the question whether the sense of duty which defendant conceived herself to be under was such as would raise the defence suggested, is a question of law for the Judge who tries the case. In the meantime, if there are any special circumstances upon which the defendant relies other than those mentioned in argument, as giving rise to this sense of "duty," they must be mentioned with particularity in the plea.

The plea of justification is in these words: "Such words as may be admitted or be proved to have been used by her are true in substance and in fact."

No form of pleading can be well conceived which would be more improper. "It is not competent to the defendant in any plea of justification to allege that he published certain defamatory matter other than the defamatory matter set out in the statement of claim, and that the matter alleged to have been published by him is true." **Spencer-Bower,** "Actionable Defamation," Article 26, Rule 5.) So the Court held in **Rassam v. Budge** (1893 1. Q.B. 571) where the defendant did at least set out his own version of what he had said and proceed to justify that. Here the defendant merely intimates her intention to justify "such words as may be admitted or be proved"—whatever they may be. It is quite impossible to gather from this plea even whether defendant proposes to justify the allegation of dishonesty or of unchastity, or both. A defendant may justify as to part when the imputations are distinct and severable, but in that case also the plea must give such particulars of time, place, and circumstances as will enable the plaintiff to know with precision what he has to meet.

Solicitors for plaintiff: **A. Dunn,** Wellington.
Solicitors for defendant: **Mazergarb, Hay, & Macalister,** Wellington.

ELECTION COURT.

Stringer, J. March 8, 9, 10, 1926.
Ostler J. Westland.

O'BRIEN v. SEDDON.

Election—Elector—Disqualification from voting—Absence from district—Whether necessarily disqualification—Voting—Placing cross opposite a candidate's name—Effect of.

The facts of the petition are not material for the note we make herein. We have set out almost at length various matters decided by the Court touching the legal aspect.

Joyce for petitioner.
Murdock and **Hannan** for respondent.

THE COURT dismissed the petition. In the judgment of the Court given by STRINGER J. the learned Judge said: The claim is based on a variety of grounds which will be dealt with later. The main ground, however, is that a large number of persons, of whom a list was given, were illegally registered on the Electoral Roll of the district, in that they had not resided in the district for the necessary period, or that they had become qualified to register in other districts.

On the other hand the respondent has set up a recriminating case in which he makes the same allegations with regard to a number of persons, a list of whom was given.

Before dealing with the different claims under these headings it is necessary to state the principles upon which the case must be determined.

A person who is registered as an elector of any district does not forfeit his qualification merely by reason of absence from that district for a period of three months immediately prior to the election. More than that is required. He must become registered in another district, or become qualified to be so registered before he can be held to have forfeited his qualification. In order to become qualified

to be registered in another district he must reside in that district for three months. At the end of that period if the roll has not then been closed by the issue of the writs, he is qualified to become registered in that district. If a registered elector leaves the district of his registration and travels about the country so that he cannot be said to have any new residence, or if he resides less than three months in any new electorate, then as he never becomes qualified for registration in another district he does not lose his original qualification and can cast a valid vote in the district in which he is registered, notwithstanding that on the date of the election he is not actually residing in the district in which he has registered. Consequently, in order successfully to challenge votes cast by registered electors who have been absent from the district, it is not sufficient to prove merely that those electors have been absent for a period of three months. It must be proved that they actually resided for a period of three months before the closing of the rolls in another electorate, and so become qualified for registration in that district. As the presumption should be in favour of the validity of all votes cast by registered electors we are of opinion that the onus of proof lies heavily on the challenging side and strict proof should be required. Consequently, where it is proved merely that an elector went away on holiday or for a temporary visit—even though during that holiday or visit he resided in another district for a period of three months but still retained the intention of returning, or where it is merely proved that an elector left the district and went to reside in another district, but there is no proof that he continued to reside in that district for a period of three months before the closing of the rolls—in our opinion the onus of proof has not been discharged. Again, where it is proved that an elector has his home in the district in which he is registered, to which he periodically returns, whether that home is that of his parents or of his wife and family, then notwithstanding that he is proved to have remained in some other district for a period of upwards of three months engaged in his avocation, or as a student, the onus of proof is not discharged for the elector can reasonably claim that his home is his true place of residence.

Conversely, where an elector has his matrimonial home in another electorate, but is constantly engaged in work in this electorate having a permanent house, or even a hut or tent in which he lives while engaged in his work, that elector can truly claim that he resides in this district. **The Taumarunui Election**, 1915, N.Z.L.R. p. 562. It is on these principles that we have acted in deciding the issues raised by paragraph 3 of the petition.

With reference to those cases where the objection raised is that the voter had not resided in the district for not less than three months immediately preceding the date of his application for registration as provided by Section 15 of The Legislature Amendment Act, 1924, we are of opinion that if it is proved that when the voter passed his vote he was qualified to vote, he is not disqualified merely by the fact that he was not qualified at that time of making his application.

For this proposition we think the **Hawke's Bay Case** 34 N.Z.L.R. 409, is ample authority. It was there pointed out that if a person has a right to be enrolled and a right to vote, the mode in which he gets on the roll is a matter of procedure only. The object of the various Statutes is that persons qualified to vote who are on the roll should be allowed to vote while those who are not qualified although on the roll should not be allowed to vote. It would, for example, be absurd to hold that a person who had been placed on the roll on an application made when he had been residing in the electorate for three months all but one day was disqualified from voting although at the time of the election he had been residing in the electorate for a year or more immediately prior to the election. In our opinion, therefore, if at the time of the election the voter is otherwise duly qualified to vote, the method and procedure by which his name was placed on the roll is immaterial.

In any case, the question is of no importance in the present instance for the reason that if the objection were valid it would apply to 5 cases objected to on this ground by each of the parties.

A further matter to be dealt with is the contention by counsel on behalf of the respondent that voting papers marked with a cross opposite or by the side of the name of a candidate should be treated as invalid. The question is by no means free from doubt, but we have come to the conclusion that we ought not to uphold this contention. It must be assumed that a person who takes the trouble to go to the poll and goes through all the formalities of voting intends to cast a valid and effective vote. If he marks the ballot-paper by placing a cross against the name of a candidate he must mean to vote for or against such candidate. Now, seeing that the placing of a cross against the name of a candidate has, for many years past in Municipal Elections in New Zealand been the prescribed method of indicating the desire of the voter to vote for such candidate it is in the highest degree improbable that this method should be used by an elector not as an indication of a desire to vote for the candidate but the reverse.

The question, which is one of fact, is, has the elector clearly indicated the candidate for whom he desired to vote. In the opinion of the very capable, careful and experienced Returning Officer, who had control of this election the electors who marked the ballot papers with a cross did so, and we see no good reason for disturbing his decision.

The same principle was adopted in England by Hawkins J. in the **Cirencester Case** (**Fraser on Election Petitions** page 42) in which he said:

"With regard to those votes as to which objections have been raised to the mode in which they were marked by the voters, we have proceeded upon what we think was the true intention of the Legislature in framing the Act of Parliament. We have, first of all, asked ourselves whether the voter received his paper with the intention to vote. The mere fact that he has applied for and received a voting paper affords abundant evidence that such was his intention. Then we have looked at the face of the paper itself with a view to see whether or not the voter has by any mark clearly indicated the person for whom he wished and intended to vote; and if we have found such a mark we have upheld the vote regardless of the very technical, and as we think, unsubstantial objections which have been allowed in some of the earlier cases to be found in the reports of election cases, our view being that we ought to interpret the Ballot Act liberally, and, subject to other objections to give effect to any mark on the face of the paper which in our opinion clearly indicated the intention of the voter. . ."

MISTAKEN IDENTITY.

—by—

J. F. B. STEVENSON, Esq.

(Concluded.)

I know not whether Laws be right,
Or whether Laws be wrong;
All that we know who lie in Gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long.
"The Ballard of Reading Gaol".

In this article it is proposed to endeavour to draw attention to the precepts to be learnt from the cases of mistaken identity which have periodically occurred in our criminal history in the past. It is a truism that none of us are infallible, but if attention to certain rules may prevent the happening in our land of such judicial catastrophes as have occurred in England, then it behoves all to give the most urgent heed to such rules. The experience of the past has shown that after it has been proved that a wrong conviction has been obtained in a criminal case, juries for some years thereafter are very timid about convicting an accused person, even in clear cases. Under these circumstances it is just as much in the interests of the Crown as of the public and accused persons that no wrongful conviction should be obtained whereby faith in the administration of justice be shaken.

Some of the outstanding warnings which should appeal to all minds from a study of the cases are, it is submitted, the following:—

First, that the most scrupulous care should be taken in the method adopted to identify an accused person, and especially in the method of preparing and conducting an identification parade.

We have seen the circumstances under which Major Sheppard was picked out at an identification parade, and how the subsequent enquiry found that the parade was little less than a farce. But for a lucky chance by which the Major's innocence was proved, it would have been a farce with a very tragic air for him. Again rightly or wrongly much was alleged by Adolf Beck and his partisans as to the unfairness of the identification parades at which he was picked out by the various women. It is no mere fortuitous happening that in numerous recorded cases of mistaken identity the same old complaint as to the procedure adopted at the parade has arisen. The court of Criminal Appeal in England fully realises the grave danger of wrong convictions founded on evidence of identity, and has no hesitation in quashing convictions where the strictest fairness has not been observed in the methods adopted to identify an accused person. Recently for instance, the Court (Lord Hewart C.J., Sherman and Salter JJ.) commented adversely on Police Officers showing photos to identifying witnesses before the identification of the accused and quashed the conviction recorded Rex v. Dwyer and Rex v. Ferguson (1924) W.N. P. 319. Again in Rex v. Morrison (1911) 6 Cr. App. R. P. 170 the Court laid it down that if it thought witnesses were identifying a photo when they were purporting to identify a man, it would not hesitate to allow an appeal. Witnesses should not be asked to see accusd persons apart from other persons Rex v. Smith (1908) 1 Cr. App. R. P. 203. It is also an improper method to point to an accused person and ask "Is that the man?" Rex v. Chapman (1911) 7 Cr. App. R. P. 53. Where the detectives had told the witnesses of their suspicions of the accused, Pickford J. said "It was an extremely improper thing to do", and the conviction was quashed on the ground of insufficient identification. Rex v. Bundy (1910) 5 Cr. App. R. P. 270. Also in Rex v. Williams (1912) 8 Cr. App. R. P. 84 the conviction was set aside on similar grounds, after the accused had served his sentence. Another case of the quashing of a conviction by the Criminal Court of Appeal occurred in Rex v. Hopkins (1912) 7 Cr. App. R. P. 126 where after the accused had been identified by the owner of an overcoat as the thief who had stolen it, and duly convicted, another man was proved in fact to have stolen the coat. This second man confessed when arrested, and picked the coat out from several coats shown to him. Since its inception the Court has issued warning after warning that all identifications of accused persons must be scrupulously fair, and have quashed conviction after conviction. As one further example the words used in Dickman's appeal may be quoted:—

"The second point I desire to take is that elicited by Mr. Mitchell-Innes to the effect that when he went down for the purpose of seeing if he could identify Dickman he was first invited by somebody, possibly on behalf of the police, to look through a window, and on doing so did see, sitting alone, the person who was afterwards convicted. We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, and we hope that instances of this being done are extremely rare. I desire to say that if we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent, and they should be most scrupulous in seeing that it is so". Rex v. Dickman (1910) 5 Cr. App. R. P. 135.

Even where the accused is placed amongst a number of other men, and the witness asked to pick him out, there is still scope for such a parade to be an improper one. The Home Secretary in England has taken such a serious view of this aspect of identifications that last year he issued instructions that all accused persons are to be informed that they are entitled to have a Solicitor or a friend present at their identification parades, and notices to this effect are to be displayed in all Police Stations. If the person who says that he can identify the criminal, states that he noticed some particular point or peculiarity about the person who committed the crime, it would obviously be unfair to put an accused person exhibiting such particular point or pecularity amongst several others without it. In Major Sheppard's case the witnesses spoke of a smartly-dressed gentleman of military appearance, and the Major says he was placed amongst a poorly-dressed crowd, some without collars and some with "chokers". Again if the real criminal is alleged by the witnesses to have a certain colour of hair, eyes, or complexion, or to have been very tall or short, or to have been wearing clothes of a distinctive kind or colour, and the accused also exhibits the point noticed, he should not be put in the parade with a group of men none of whom exhibit such point. A case came under the writer's personal notice where the witnesses spoke to a criminal with a limp and a stick An ex-soldier with a limp and a stick was in due course arrested, and when placed in the parade he was by an oversight left with his stick in his hand, whilst none of the others had sticks. He was picked out as the criminal (mainly, I think, by the stick), but luckily the jury, without hesitation, brought in a verdict of not guilty.

Secondly, the Crown should bring to the jury's notice the fact that some of the persons who purported to be able to identify the real criminal failed to identify the accused.

It is strongly submitted that the Crown should so present its case as to bring forcibly before the Court the fact that although certain persons identified the accused, others failed to do so. If three persons identify the accused, but two more fail to do so, this aspect should be left to the jury. The Crown failed to adopt this course in Beck's case with the lamentable results we know of. Beck alleges that upwards of 12 women failed to identify him as the man who defrauded them. The police at the enquiry admitted to some five or six. However, it is significant that some of the women who failed to identify Beck immediately picked out the real culprit, Smith, years later, when he was finally brought to book It is only in accordance with our British love of fair play, and the spirit in which our criminal law should be administered, that an accused person should be given the benefit of every reasonable

doubt, and every chance in his fight for his liberty and good name. To carry this out the evidence of non-identification should be put forward by the Crown. Indeed the Court of Criminal Appeal has now approved of this practice.

A prisoner, Finch, appealed against his conviction for a series of frauds which it was alleged he had committed. His defence was an alibi In the identification parade some of the persons defrauded failed to pick out Finch. The conviction was quashed by the Court of Criminal Appeal mainly on the ground of the failure of the Crown to bring to the jury's notice that appellant Finch had not been identified in some cases.

Thirdly, evidence of what are called experts in handwriting is by no means conclusive.

This class of evidence is merely the opinion of the witness. Mr. Sergeant Ballantine sagely remarked that "Handwriting is a dangerous element upon which to rest a case; the evidence of what are called experts is viewed with no great confidence." In Beck's case the expert evidence said the writing on the fraudulent cheques and in the letters was the same as Beck's admitted handwriting. This evidence was wrong, and Gurrin, the alleged leading expert of the day, retracted his evidence at the inquiry, and admitted he had made a mistake when he gave evidence against Beck.

Fourthly, too much reliance should not be placed on evidence of identification, especially if given by women, unless such evidence of identification is amply corroborated by other independent facts.

The cases show that when once a woman has picked out a man, she becomes more confident and cock-sure under cross-examination. After seeing the accused she will even amplify the description she first gave to the police, and will herself honestly believe such amplification. In Beck's case for instance a woman under cross-examination said for the first time that she recognised Beck by his peculiar nose—"one in a thousand"—and Beck's peculiar nose was pointed out to the jury. She had said nothing to the police about a peculiar nose, and she was certainly wrong in saying she noticed a peculiar nose on the man who defrauded her. The first time she actually noticed the peculiar nose was at Beck's identification parade, and she probably convinced herself that she had seen it before

These little imaginings of women—perhaps told in the best of faith—have a most damaging effect on an accused's case with a jury, and often finally dispose of his chances of freedom. The matter may be summed up in the words of the Commission of Enquiry in Beck's case which were:—"Judges, however able, are fallible, and evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied on, and, therefore, unless supported by other facts, **an unsafe basis for the verdict of a jury.**"

The above lessons are no idle whims of fancy. The fact that Beck, an innocent man, could be not once only, but twice convicted, and that an application to the Home Office upon the first of such convictions could lead to no redress, naturally created grave misgivings in the public mind as to the nature and working of the system of criminal justice in England. Happily we have not had any such grave scandal in New Zealand, and with a just judiciary, impartial Crown Prosecutors, a bold, and fearless bar, and a fair-minded police, it is to be hoped that we will escape such miscarriages of justice in the future. However, the danger is ever at our door, and watchful we must ever be.

LONDON LETTER.

(6-1-1926—continued.)

A little less dull and depressing, possibly, from your point of view may be our new fees' order regulating the charges of the Public Trustee, which also came into force with the New Year and which has been framed to meet the requirements of the new Acts as well as reduce the amounts payable. A reduction is made in the capital fees on acceptance, and nominal fees only are henceforth to be charged where the duties of the trustee become, under the Settled Land Act, 1925, themselves nominal. There are other special provisions as to the estates of infants, as to the trusteeship of the entirety of land held in undivided shares and as to certain special trusts which come into operation by virtue of the new Acts. To my thinking, much the most interesting side of the new Acts is the trusteeship aspect. I have recently read a peculiarly intriguing article, in one of the big Joint Stock Banks' Monthly Circular, upon the concern of Banks in this development, the deduction of which is:—"It certainlyl seems that the utility of banks, and other similar institutions, as trustees is likely to be increased . . . . and it may be confidently anticipated that, as time goes on, the number of cases in which trust corporations act instead of private indiiduals will be very largely increased".

The Report of the Committee on sexual offences against young persons is rather an alarming portent, in that the Committee appear to have been so impressed with the horridness of the offence that they will have no sort of mercy shewn to, nor consideration had for, persons charged with committing it. If you read that observation quickly, and without profound thought, it involves no very drastic charge against the committee let alone any matter of alarm, portentous or other? Re-reading the sentence, you appreciate the point: the more horrid the offence, the more (and not the less) careful you should be to convict the right man of it! So far from strengthening the rules of evidence and the convenctions, as to the credibility and prompting of children in the box and as to the corroboration, the Committee is apparently prepared to forego all, to the intent that, whenever a small person is said to have been indecently assaulted, someone (be it the right man or the wrong one, be it on proof or suspicion) should hastily be sent to prison. These days, we are all very clever with our words: those of us who are not orators are writers, and a resounding period is held to be worth any modicum of common sense. The report is admirably worded and convincingly argued: unless we are careful, it holds us by our devotion to th small people and forces us, in the mood, to abandon every principle of liberty and justice we have acquired as lawyers. When I read of "cases in which, after the prosecutix has told her story and the case has been closed without corroborative evidence, the Judge has directed

the jury to acquit", I almost leapt from my chair to shout death to the Judge who dared do so brutal an act! The cases probable were (and I remembered, in my cooler moment, more than one of my own of this nature) that the child was obviously repeating a suggested identification or otherwise clearly not to be depended upon as to some paramount point, from the accused's point of view: and the Judge said, and we can hear him saying it, "horrible though these crimes are and anxious as we must all be to catch and confine their perpetrators, yet my experience of witnesses makes it impossible for me now to let you consider the convicting of this man, presently charged and on his trial".

The Committee recommends the raising of the age under which it is possible for a girl effectually to consent to being assailed, and the Committee is apparently without experience or information as to the number of young nymphomaniacs pestering decent, hard-working, naturally healthy and humanly weak young men. To call upon the latter to protect the former, in all cases and whatever the circumstances, and to protect them against their own persistent lust is really admirable sentiment but, to any lawyer of any criminal experience, mad politics. The Committee proposes the complete elimination of any defence based upon a reasonable belief that the girl was over 16 years of age, and the Committee again is apparently without knowledge, though its own eyes or anyone else's, as to how the vampires disguise their age, by adjusting their hair and so forth. Brutally, briefly and baldly, if the committee has its way there will be only one safe attitude towards the so-called "weaker sex" in the future, and that is to marry it while it is young or have nothing whatever to do with it until it is manifestly old. This may be excellent morals; but attempts to compel high moral standards by means of the criminal courts usually end in disaster and always involve the sacrifice of a large number of innocent victims. The Report, in which the influence of a fanatic, feminine element must be suspected and as to which the minority memoranda of the male members indicate considerable trouble on their part to keep the thing on anything like reasonable lines, is one to be read not only by the criminal lawyer but by anybody who is interested in the liberty of the subject, the history of the past and that disquieting maxim that "history repeats itself". I pray there is to be no repetition of the Star Chamber or the Inquisition: I doubt if even the advocate's situation would be too safe, and I half suspect that this Committee would prefer to have the accused person and his counsel put away, without further (and revolting) enquiry, in cases of this particular kind. The real harm of the report, however seems to me to be the mischief that the children will suffer from it. Had the Committee kept its head, and restrained its heart, we might have ultimately had a clearing up of some very confused law, which would have assured its best possible administration. The result of this "high falutin'" treatise can only be further disputes among the lawmakers and more latitude for the law breakers, by reason of the many holes of escape which their compromises will leave.

Lastly, the subject of "fusion" of the two branches of the profession has again been canvassed, recently, but as neither the Bar Council nor the Law Society appear to have any enthusiasm or substantial mandate in the matter, it looks as if nothing is to be done about it for the present.

Yours ever,

INNER TEMPLAR.

The Temple, London,
20th January, 1926.

My Dear N.Z.,—

In the Inner Temple Hall, on Monday last, the ancient moot was revived, after a lapse of a hundred and seventy years. Read the account in the "Morning Post" hastily compiled by a young man in these chambers, who was asked at the last minute to report the matter and was thrilled to the core to be thus involved with the midnight machinery of the daily press! He supplied me with an item which I did not know before, and perhaps you did not? The moot used to be known as the "impanlance". There is no other news of a domestic sort; the diverting rumour of developments in the "Fusion" movement was, as you will have seen, heavily discounted by the Attorney General, in his address to the General Meeting of the Bar. He thinks we have all been unduly perturbed in our minds and unnecessarily canvassed by our newspapers, as to the recent treatings for the easier admission of solicitors to our privileges. I have mentioned this matter to you recently, and I say no more than this, that an official dementi always slightly encourages my belief in the allegation denied! The more essential point of course is:—are barristers ever going to be admitted to the great privilege of the solicitor, direct contact with the lay clients? If not, then it still continues to be my view that a number of them will die of paper-starvation in the coming months.

No very remarkable cases have yet been decided this term: the interlocutory incident in the defamation case (Emerson v. Grimsby Times and Telegraph; see the "Times" of 12 January) is the most important of them. A zealous and impulsive newspaper, having obtained from the persons to be concerned in it an account of a wedding about to take place, printed the graphic narrative of the event a day before the event took place! Why this does not happen more frequently is more than I can tell you; the reason must be the reliability of the system in newspaper offices, for I can vouch for the fact that there is no sort of reticence among people nor any hesitation to give the most detailed reports, to the papers, of public appearances, speeches or displays they are about to make. Here, at any rate, it happened, and the victims of the unconscious jest desired to sue in libel in respect of it. Upon application, under our Rules of the Supreme Court, Order 25, Rule 4, Finlay J. struck out the Statement of Claim as disclosing no reasonable cause of action. The proceeding under review was to ascertain whether Bankes, Warrington and Atkin L.J. felt the same way about it, as did Finlay J. Of course Bankes L.J. did; he is a Judge of Appeal almost invariably and entirely guided by his instinct for commonsense solutions. Warrington L.J., I suppose, felt inclined the same way and was relieved of doubt and decided in his opinion by the strong view of so practised a common law and (in his day) defamation man as Bankes L.J. Why Atkins L.J. concurred in a judgment, so obviously ques-

tionable, and suppressed, after stating, his own inclinations, so manifestly logical and proper, I am sure I cannot tell you. I have never felt, about any decision in which I was in no way concerned myself, so absolute a certainty that it is wrong. Indeed, I incline to mark down this case as a leading example of the wrong-headedness of the Court of Appeal which is presided over by Bankes L.J. Three Judges say to themselves that so far as they can tell from the pleadings they would be readily inclined to rule that the premature account could never be shewn to be capable of a defamatory meaning, and that, so far as they could foretell, they themselves would never let it go to a jury. Atkin L.J. however, could not omit to observe what is obvious to all of us, that it was impossible to come to a decisive conclusion as to this without hearing the case; if there is any truth in that observation, the judgment is necessarily wrong. It is not only extreme, it is (and is, by the Rules, recognised as being) drastic to exclude a person from suing, however little the Court, on an interlocutory consideration, may be inclined to give for his prospects of success. Such an expedient is only to be adopted in absolutely clear cases. Who can even read Fraser's textbook and yet say that without a shadow of a doubt such a premature account of a wedding could not, whatever the circumstances, be held capable of being defamatory? The truth is, there is too much of this so-called "commonsense" in the court of Bankes L.J.; I will concede it is very common, but it is not often sense.

In a rather unpleasant divorce case, the other (and better) Court of Appeal came to a more proper conclusion on the same point and under the same order and rule. (The "Morning Post" digest of Monday has a note of it, under the discreet title "R. v. R." The parties names were Renier and the type of case relied upon was, as the digester also omits, Synge v. Synge [1900] P. 193). To a wife's petition, the husband answered with a plea of "conduct conducing": see section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925. The foundation of his plea was that the wife was a woman devoted to unnatural practices and, in particular, living at material times and for a material period with another woman in order to satisfy that preference. Here, again, we may all feel that, however far we have advanced in the equalization of the sexes and whatever concessions we must make to the man now we admit the complete equality of the woman, there is very little reasonable hope of success for such an answer. But Hill J. at first instance, and the Master of the Rolls' Court, on appeal, were firmly of the view that, to strike out a pleading, a court must assume that all the allegations in it are completely established and be satisfied that even so it is impossible for them to constitute a point in law. Can that be said, or begin to be said, of our libel case?

Yours ever,

INNER TEMPLAR.

FORENSIC FABLES.

—No. 17.—

THE TRAVELLER WHO SUFFERED FROM SHOCK AND THE RAILWAY COMPANY'S PHYSICIAN.

A Traveller who was not Such a Fool As he Looked, had the Good Fortune to Escape from a Railway Accident with Nothing Worse than a Nasty Shake. But Feeling that the Railway Company might well be Encouraged to Cough Up he Instructed his Solicitor to write a Suitable Letter. The Railway Company Politely Suggested that their Physician should Visit the Traveller and Ascertain the Extent of his Injuries. The Railway Company's

Physician in Due Course Waited upon the Traveller, and Found him Seated in an Invalid Chair in a Completely Paralysed Condition. He was so Horrified by his Appearance that he Quite Forgot to ask the Traveller whether his Dilapidated State was the Result of the Railway Accident. It was in fact Due to the Negligence of a Nurserymaid who had Upset the Traveller's Perambulator in Kensington Gardens in 1864, when he was Twelve Months Old. But the Traveller did not See why he should Trouble the Railway Company's Physician with these Autobiographical Details. When the Railway Company Offered the Traveller £2,000 in Full Settlement he Wisely Held Out for £2,500, and Got It.

Moral: Sit Tight.

BENCH AND BAR.

Mr. H. F. Von Haast, M.A., LLB., a frequent contributor to this Journal, has relinquished practice as a Solicitor and intends to devote himself exclusively to Barrister work. He has been practising at the Wellington Bar since 1903, he being throughout that time in partnership with Mr. A. R. Meek.

Mr. Von Haast has been Solicitor and Council to the New Zealand Law Society for some years past. He has also been an Examiner in Evidence and Contracts for the New Zealand University and has taken a prominent part in furthering the much needed reform in Legal Education.

Mr. K. A. Williams, solicitor, formerly practicing at Ohura has opened chambers at Marton.

Mr. William J. Spring, late of the Conveyancing Staff of Messrs. Stewart Johnston Hough and Campbell, Auckland has commenced the practice of his profession in Auckland.

Mr. D. Grant, New Plymouth, has been admitted as a Solicitor of the Supreme Court of New Zealand by His Honour Mr. Justice Reed.

Mr. F. W. Horner, Solicitor, Hawera, has been admitted as a Barrister of the Supreme Court of New Zealand by His Honour Mr. Justice Reed.

Mr. B. J. Dolan for many years the dominant figure at the Bar in the Hawke's Bay District has taken chambers in Wellington, where he intends to extend the practice of Messrs. Dolan and Rogers.

Mr. Alexander Gray K.C. has dissolved partnnership with Mr. Douglas Jackson and has been joined by Mr. E. M. Sladden. The new partnership practising under the title of Gray and Sladden.

Mr. E. M. Sladden, who has joined Mr. Alex. Gray K.C., was, until recently, a member of the Napier firm of Carlile, McLean, Scannell and Wood. Seven years ago he was a member of the Wellington firm of Field, Luckie and Sladden.

Mr. A. R. Meek, who has dissolved partnership with Mr. F. Van Haast, is continuing the practice formerly carried on under the firm name of Meek and Von Haast.

Mr. C. A. Speight, LLB., lately managing clerk to Messrs. Tudhope and Adams, Solicitors of Hamilton; and Mr. F. W. Course, lately of the staff of Mr. A. Hanna, Solicitor, Auckland, have commenced the practice of the profession in partnership in Hamilton. The practice is being conducted under the style of Speight and Course.

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DISSOLUTION OF PARTNERSHIP.

THE Partnership heretofore existing between MESSRS. ALEXANDER GRAY, K.C., and DOUGLAS GEORGE JACKSON, in the Practice of Barristers and Solicitors, under the style of "GRAY AND JACKSON," has been dissolved as from 31st March 1926.

MR. GRAY will henceforth practise at the offices hitherto occupied by Messrs. Gray and Jackson, in "Banks' Building," No. 11, Grey Street, Wellington, where accounts due to, and owing by, the late firm will be received and paid.

MR. JACKSON will practise on his own account at Offices in the "Druids' Buildings" (second floor) at the corner of Lambton Quay and Woodward Street, Wellington.

Wellington, 31st March, 1926.

(Sgd.) A. GRAY.
(Sgd.) DOUGLAS JACKSON.

PARTNERSHIP NOTICE.

MR. GRAY has admitted into partnership with him MR. EDMUND MOURILYAN SLADDEN, formerly of Wellington, and for the past six years a member of the firm of Messrs. Carlile, M'Lean, Scannell, and Wood, Barristers and Solicitors, at Napier and Hastings. The Practice of the new firm will be carried on under the style of "GRAY AND SLADDEN" at the offices hitherto occupied by Messrs. Gray and Jackson in Banks' Buildings, No. 11, Grey Street, Wellington.

Wellington, 31st March, 1926.

A. GRAY.
E. M. SLADDEN.

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MESSRS. DOLAN & ROGERS of Napier and Hastings, Barristers and Solicitors, have extended their practice to Wellington, where Mr. B. J. Dolan has taken chambers at 49-51 Ballance Street (opposite Law Library, Supreme Court and Magistrate's Court side entrances). Mr. L. A. Rogers, LL.B., will carry on the Hawke's Bay practices.

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