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, JUNE 22, 1926.

MARRIED WOMEN AND THE LAW.

The Article appearing in this issue has been graciously contributed by Sir Robert Stout, P.C., K.C.M.G., LL.D., D.C.L., who recently retired from the position of Chief Justice of New Zealand. In the article in question Sir Robert Stout refers to one of the amendments he would like to see brought about. He has for a long time held the definite opinion that the Dominions of the British Empire should have an extended jurisdiction in regard to domicile. Whether his view is acceptable or not does not for the purposes of the article matter very much. There can be no doubt that the Dominions have not the jurisdiction Sir Robert Stout is in favour of.

HONOURABLE T. S. WESTON.

One more addition to the Upper House which will meet with the approval of the profession is the appointment of Mr. Thomas Shailer Weston, Barrister and Solicitor, Wellington. The Hon. Mr. Weston's appointment is a fitting reward for his great interest in public and political life. The Hon. Mr. Weston was educated at the State School, Hokitika, and then at Christ College. In the latter he was Head of the School. He graduated M.A. and LL.B. at Canterbury College and gained first class honours in History and Political Science, and also obtained in the same subjects a Senior Scholarship. He began his legal career as Associate to the late Sir John Denniston. In 1893 he began to practise on his own account in New Plymouth, and during his residence in the Taranaki District he was a member of the New Plymouth High School Board of Governors, Chairman of the Taranaki Chamber of Commerce, Master of Masonic Lodge Ngamotu, Member of the Committee and Steward of the Taranaki Jockey Club. He remained in New Plymouth for ten years. Then he came to Wellington and joined the firm of Skerrett, Wylie & Weston. He remained a member of this firm for two years when he joined the Hon. C. H. Izard with whom he remained in partnership until the latter's death last year. Since his residence in Wellington his interests have been manifold. Among the most important was Chairman of the Wellington District Repatriation Board. He held this position for four years. He has been President of the N.Z. Employers' Federation for thirteen years, and President of the N.Z. Academy of Fine Arts for a number of years, Captain of the Wellington Golf Club, and a Director of many Companies, including among them the Wellington Publishing Company, Metropolitan Building Society, several Coal Mining and Sawmilling Companies, The Coastal Shipping Company, Ltd., and Scoullar and Company, Ltd.

The Hon. Mr. Weston's career as a Barrister and Solicitor has been remarkably successful. While not possessing great eloquence he has been regarded as a thoroughly sound lawyer and careful conveyancer.

The Hon. Mr. Weston's father was Mr. T. S. Weston, of Christchurch, twice a Member of the Lower House, and was a member of the legal profession. He has three brothers: Mr. George T. Weston, of Christchurch, and Colonel C. H. Weston, D.S.O., of New Plymouth, both Barristers and Solicitors, and Mr. W. C. Weston, Proprietor of the "Taranaki Herald."

If the Government add to the Members of the Upper House men of the experience and calibre of their latest appointee the country will be greatly benefitted. We offer our congratulations to the Hon. Mr. Weston on his appointment.

SIR ROBERT STOUT.

There is a movement afoot to have Sir Robert Stout placed in the Upper House. His long experience as an interpreter of the laws, his long experience in public life, and his long experience in Parliament should be sufficient argument in favour of the movement. The profession would to a man rejoice at the appointment.

SUPREME COURT.

Sim, J. May 17, 28, 1926.
Invercargill.

McPHERSON v. ANDREW LEES, LTD.

Debt—Assignment—Equitable assignment—Of part only—Sec. 46 Property Law Act—Whether valid—Contract for painting—No provision for progress payments—Effect on assignment—Magistrates Court Act—Sec. 62—Assignor not named in plaint or summons—Effect of—Waiver.

This was an appeal from the decision of the Magistrate at Invercargill, and was dismissed. The following were the relevant facts:

One W. J. Selwood entered into a contract to paint the appellant's house for £65 6s. 6d. For the purposes of his contract Selwood bought from the respondent a quantity of materials, and gave an order on the appellant for £25 in payment. On or about the 9th of April, 1925, the respondent posted the order to the appellant with a covering letter. The order and letter were as follow:

Mr. A. McPherson, Waianawa.

Please pay to Andrew Lees, Ltd., the sum of twenty-five pounds stg. (£25) out of moneys which will be due to me from you on house-painting contract.

Yours,

W. Selwood,
9/4/25.

Mr. A. McPherson, Wianawa.

Dear Sir,—

Mr Selwood, painter, has given me an order on you for £25 to be deducted from moneys due to him by you for painting job. I forward the order for you to sign and return to me, and trust that you will retain the amount, £25, from money due to him at conclusion of job. I enclose covering letter from Mr Selwood to myself, which also kindly return. Please sign order where marked.

Thanking you in anticipation,

Yours faithfully,

Andrew Lees, Limited,
D. G. H. Rens, Manager.

At the foot of the order was written the following undertaking:

"I accept this order as binding, and will hold the amount of £25 from monies due or falling due to W. Selwood, and pay same to Andrew Lees, Limited."

The appellant signed this undertaking and returned the order to the respondent. On the 8th of May, 1925, the appellant paid a sum of £25 to Selwood on account of work done by him in performance of his contract. Selwood thereupon abandoned the contract, and it took the balance of the contract price to finish the job. The respondent sued the appellant to recover the £25 for which the order was given by Selwood, and the Magistrate (Mr. Cruickshank) gave judgment in favour of the respondent. The question for determination is whether or not the decision of the Magistrate is correct in point of law.

Stout for appellant.
Raines for respondent.

SIM, J., upheld the decision of the Magistrate. To the contention that as it was an assignment of part only of a debt, it was not valid within S. 46 of the Property Law Act 1908, and that respondent could not recover without joining Selwood. Sim, J., said:

The question whether or not the assignment of part of a debt is a good assignment within the meaning of the corresponding section of the Judicature Act was raised, for the first time apparently, by Chitty, L. J., in **Durham Brothers v. Robertson**, (1898) 1 Q.B. 765, and has been considered in several subsequent cases. The decisions and dicta on the subject are referred to by Lawrence, J., in his judgment in **In re Steel Wing Co.**, (1921) 1 Ch. 349, 354. The weight of authority seems to be in favour of the view taken by the learned Judge in that case, that an assignment of part of a debt is not a good assignment within the meaning of the Judicature Act. I find it unnecessary, however, to decide this question in the present case. The appellant, by signing the undertaking indorsed on the order, promised to pay the £25 to the respondent out of the moneys payable to Selwood under his contract. The effect of this was to bring the case within the rule stated by Lord Blackburn (then Blackburn, J.), in **Griffin v. Weatherby, L.R. 3 Q.B. 753, 758,** and to convert what was merely an equitable right into a legal right founded on the promise, so as to entitle the respondent to sue the appellant for money had and received as soon as £25 or more was payable to Selwood under contract. The existence of the debt from Selwood to the respondent, although it might not be due instanter, was, according to the decision in **Walker v. Rostron**, 9 M. and W. 411, a good consideration for the appellant's promise to pay. In **Henderson v. Smith**, N.Z.L.R. 2 S.C. 414, the rule in question was applied by Johnston, J., to a case where the fund in hand was less than the amount of the order.

The learned Judge also held that Selwood was not entitled to receive any payment until the contract was completed, and the appellant having given the undertaking to the respondent, was not entitled to make any payment to Selwood without retaining in hand sufficient to pay respondent.

To the further contention that as Selwood's name as assignor did not appear either on the plaint or summons the Magistrate had no jurisdiction to hear the action, Sim, J., said Sec. 62 of the Magistrates Court Act 1908 provides that the assignee of a debt shall not be entitled to maintain any action for the recovery of such debt unless he names the assignor in the plaint note and summons. Selwood's name does not appear in the plaint note or summons, but appears in the statement of claim. It was held in **Friedlander Bros. v. Miller**, 28 N.Z.L.R. 97, that the omission to comply with section 62 was not a mere irregularity but went to the jurisdiction, and could not be waived by acquiescence. This case was decided in 1908, and in the following year the Inferior Courts Procedure Act 1909 was passed. Section 3 of that Act provides that such an omission, whether it appears on the face of the record or not, and whether it is within the knowledge of the Court or not, may be waived or acquiesced in by any party to the proceedings. It was contended on behalf of the respondent that there had been acquiescence in the present case, and that, if there had not been acquiescence, the appellant's proper remedy was by prohibition and not by appeal. It was held by Sir James Prendergast, C.J., in **Groves v. Somerville**, 2 N.Z.J.R. (N.S.) S.C. 1, that prohibition and not appeal is the proper remedy where a Magistrate acts without jurisdiction, and that apparently was the opinion of Denniston, J., in **Gormley v. McIntyre**, 12 N.Z.L.R. 36. On the other hand there is the case of **Barker v. Palmer**, 9 Q.B.D. 9, in which it was held that an objection to the jurisdiction of an inferior Court might be raised on appeal, although there might be a remedy also by prohibition. That decision was approved of and applied in **Sweetland v. Turkish Cigarette Co.**, 47 W.R. 511. I find it unnecessary, as Sir Robert Stout, C.J., did in **Kilminster v. Monaghan**, 21 N.Z.L.R. 522, 524, to decide the question, but it may be noted that in the case of **Cravcott v. Harrison**, 17 Q.B.D. 147, on an appeal from the County Court, Mathew, J. and A. L. Smith, J., moulded the motion on appeal into the form of a rule for a writ of prohibition, where the County Court Judge had made an order which he had no jurisdiction to make. In my opinion the appellant by bringing the present appeal has waived any objection there was to the jurisdiction of the Magistrate to entertain the action. Where the question raised is whether or not the Magistrate had jurisdiction to give the particular judgment he did, a party by appealing from the decision does not waive his objection to the jurisdiction. But that is not the position here. The objection is that the Magistrate had no jurisdiction to entertain the action at all, and yet the appellant has brought the decision of the Magistrate before this Court and asked to have it reversed as being erroneous in point of law. Such a proceeding seems to involve a complete recognition of the the jurisdiction of the Magistrate's Court to entertain and deal with the action, and is, therefore, a waiver. Whatever may be the general rule on the subject of prohibition and appeal, any objection on the ground of non-compliance with section 62 must be taken, I think, by prohibition, for it is impossible to appeal without admitting the jurisdiction of the Magistrate's Court to entertain the action.

The result is that, in my opinion, the decision of the Magistrate's Court ought to be affirmed on the grounds I have stated, and it is not necessary to consider the finding of fact on which the Magistrate based his decision. The appeal is dismissed with £7 7s costs to the respondent.

Solicitors for appellant: **Stout & Lillicrap**, Invercargill.
Solicitors for respondent: **Hodges & Raines**, Invercargill.

Skerrett, C.J. May 27; June 2, 1926.
Reed, J.

THE DAIRY PROPRIETARY ASSOCIATION ET AL. v. THE N.Z. DAIRY PRODUCE CONTROL BOARD.

Declaratory Judgments Act—Practice—Originating Summons—Abstract opinion of Court sought—Whether Court will deal with questions.

This was an originating summons on the part of the plaintiffs to have certain questions answered by the Court respecting the powers of the defendant Board. We do not publish the questions, but merely some of the remarks of the learned Chief Justice which shew the nature of the questions. He said:

The main question propounded by the plaintiffs relates to the effect of the resolution that the Board should assume absolute control over the export of dairy produce. It asked whether the effect of the resolution was that all dairy produce manufactured and owned by the plaintiffs then in existence or thereafter to come into existence passed without further act of the Board under its absolute control. It is to be seen that this amended question is limited to the produce of the plaintiffs; but it is clear that it was intended to relate to the produce of all proprietary companies. All the other questions relate to produce generally; and it is conceded that, if the question was answered in the affirmative, it is desired that the Court should answer the other questions stated in the summons. In this event it would be necessary for the Court to determine questions which traverse the whole operative powers of the statute; many of which relate to the detailed machinery by which the Board may put into operation such powers of control as it may be held to possess.

Sir John Findlay, K.C., and **Kennedy**, for plaintiffs.
Blair and **Cooke** for defendant.
Fair, K.C., Solicitor-General, for Attorney-General.

SKERRETT, C.J., delivered the decision of the Court, in which he said, in refusing to answer the questions:

We do not think it is necessary to discuss the classes of cases which fall within the provisions of the Declaratory Judgments Act. We are not asked to determine only what is said to be the main question apart from the other questions raised. Indeed, from what Counsel has said, a determination of that question alone would not carry out the objects of the summons. The plaintiffs plainly desire the abstract opinion of the Court upon the general powers conferred by the statute upon the Board.

It is clear that the Court has a discretion as to giving or making a declaratory judgment or order, and may on any grounds which it deemed sufficient refuse to give or make any such judgment or order. (See Section 10, Declaratory Judgments Act 1908).

The present case is not an action for a declaratory judgment, but is an application under Section 3 of the Act for a declaratory judgment determining a question or questions as to the construction of a statute. Even where a declaratory judgment has been sought in an action, and not by an originating summons, the discretion to exercise the jurisdiction has been exercised with great caution. Viscount Finlay in **Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, 1921 2 A.C. 438 at p. 445**, quotes the opinion expressed in a number of cases, as follows:—"It should be exercised sparingly. **(In re Staples 1916 1 Ch. 322)**; "With great care and jealousy" **(Austen v. Collins 54 L.T. 903, 905)**; "With extreme caution" **(Faber v. Gosworth Urban District Council 98 L.T. 549, 550)**. Stirling, J. took the same view on the subject in **Grand Junction Waterworks Co. v. Hampton Urban District Council** 1898 2 Ch. 331, 345, and Lord Sterndale, in **Markwald v. Attorney-General** (1920 1 Ch. 348, 357), said that there has been too great a tendency of late years to ask for declarations.

In the present case it is not disguised that the object of the summons is to obtain a judicial opinion as to the general powers of the Board. Nothing short of that will suit the purposes of the plaintiffs. No concrete facts have been placed before us to show that a question of right has arisen between either of the plaintiffs and the Board as to specific produce intended to be exported. The reason, of course, is that the parties seek an abstract opinion in the nature of advice as to the interpretation of the whole statute. We are satisfied that the Court ought not to place iself (as it is invited to do) practically in the position of Counsel advising owners of proprietary factories or exporters of dairy produce upon the interpretation of the statute. We agree with the statement of Mr. Justice Isaacs in **Attorney-General of Queensland v. Attorney-General of the Commonwealth (20 C.L.R. at p. 165)**, where he says: "But were the Court to encourage suits for anticipatory interpretation of Commonwealth legislation a vista of judicial occupation would present itself of which the limits are not easy to discern." See also **Glasgow Navigation Co. v. Iron Ore Co. 1910 A.C. 293—at p. 294.** The application has the grave objection that the Court, if it granted it, would be compelled to define statutory powers in the abstract without knowledge of the facts and circumstances under which such powers might be exercised and without any certitude that many of the powers about which questions are asked will ever be exercised. Moreover, if the Court were to yield to the application it might be called upon to give an anticipatory interpretation of many kinds of documents—such as deeds, wills, memoranda and articles of association, by-laws of local authorities, and regulations made by the Governor-in-Council.

Furthermore, the plaintiffs are not the only persons, nor even the most numerous body of persons, interested in the questions raised as to the interpretation of the Act. Co-operative factories and suppliers to co-operative factories are vitally interested in the questions. If proprietary companies can export their produce it affects the efficiency of the control and directly affects all co-operative and other factories who are subject to control. It is clear, therefore, that all factories who favour absolute control and their suppliers are interested in the questions asked to be determined. If they are not made parties to the proceedings they will not be bound by our determination.

To render an order, determining the questions asked, of any value, all interested parties would require to be joined. In face of the numerous conflicting interests this would be a most inconvenient proceeding.

It has been held that the Court ought not on an Originating Summons to decide a question of construction which, whichever way it was decided, did not necessarily put an end to the litigation. **Lewis v. Green, 1905 2 Ch. 340.** On the whole, **therefore**, we think that the Court in its discretion should refuse to answer these questions.

Sim, J. May 20, 25, 1926.
Invercargill.

KERR v. KERR.

Divorce—Permanent maintenance—Petitioner husband—Wife's application for permanent maintenance—Divorce and Matrimonial Causes Act—Ss. 41 and 42—Whether jurisdiction to make order.

This was an application by the respondent wife of an order for permanent maintenance. The decision is important as shewing the proper construction of Secs. 41 and 42 of the Act and the different result from construing Sec. 42 alone.

Hewat for respondent in support.
Stout for petitioner to oppose.

SIM, J., in reply to petitioner's contention that there was no jurisdiction to make the order, relying on Harris v. Harris, 1926 N.Z.L.R. 274; 1926 B.F.N. 327, said:

In support of this contention he relied on the judgment of His Honour the Chief Justice in the recent case of **Harris v. Harris**, (1926) N.Z.L.R. 274. It is true, as there pointed out, that section 42 of the Act does not authorise the making of such an order where the decree for dissolution has been obtained by the husband. But it is clear I think, that in every case where the decree for dissolution has been made on the application of the wife the Court has power, under section 41 of the Act, to make an order for the payment by the husband to the wife during their joint lives of a monthly or weekly sum for her maintenance and support. Sections 41 and 42 of the Act were discussed fully by Mr Justice Salmond in his judgment in **Lodder v. Lodder**, (1923) N.Z.L.R. 785. I agree with his interpretation of the sections, and in particular with the conclusion at which he arrived, that the jurisdiction of the Court to make provision for the maintenance of a respondent wife is conferred and

defined by section 41 exclusively, and that this jurisdiction is not to be cut down by reference to section 42. It was under the jurisdiction conferred by section 41 that the order for maintenance was made in **Somerville v. Somerville,** (1921) G.L.R. 134, and similar orders have been made in many other cases where the wife was the respondent. I think, therefore, that there is jurisdiction to make the order asked for by the respondent, and that the case is one in which an order should be made. The principles to be applied in determining the amount to be allowed were determined by the Court of Appeal in the case of **Lodder v. Lodder,** (1924) N.Z.L.R. 355. The respondent is not able to work for herself, and has not got any income of her own. The petitioner, as the report of the Registrar shows, earns £225 per annum as a storeman, and has properties from which a net annual income of about £72 could be derived. His net annual income may be treated, therefore, as being nearly £300. In the circumstances he ought to pay, I think, £2 per week for the maintenance of the respondent, and an order is made accordingly for the payment of that sum during their joint lives, to commence from the date on which the marriage was dissolved. The respondent is allowed £10 10s for the costs of her petition, with disbursements for fees of Court.

Solicitors for petitioner: **Stout and Lillicrap,** Invercargill.
Solicitors for respondent: **Keddell and Hewat,** Invercargill.

Reed, J. May 17, 22, 1926.
Wellington.

MAZZOLA v. TURNBULL AND JONES, LTD.

Master and servant—Negligence of servant—Employer providing means of getting to work—Servant taking another means—Negligence while taking other means—Whether employer liable for injuries to third person.

This was an action for damages for negligence. The facts are as stated by the trial Judge.

The plaintiff has been injured through the negligence of a youth named Oldham, who, whilst driving a motor-car, collided with a spring cart driven by the plaintiff. Oldham was, at the time of the accident, in the employment of the defendant company, and £300 damages are claimed from the company upon the ground that it is legally responsible for the negligence of its employee. No question was raised as to the quantum of the damages, the sole question for consideration being whether the defendant company is liable for Oldham's negligence.

The company was engaged in certain electrical work at Heretaunga, and Oldham was a fitter employed on the work. He was provided by the company with a monthly railway ticket, which enabled him to go to and return from the work. All necessary appliances and material were sent by the company direct to the job. When Oldham required the assistance of an apprentice, a daily or weekly railway ticket, for the latter's use, as might be required, was provided. On the 24th December, 1924, whilst his monthly railway ticket was current, Oldham, accompanied by an apprentice (whose weekly ticket was also current), went to Heretaunga in a motor-car in which Oldham had a financial interest. Oldham drove it himself. Besides the apprentice he was accompanied by an employee of another electrical firm who was proceeding to other work at Heretaunga. At about a quarter to four in the afternoon the return journey was commenced, there being in the car, besides Oldham and the apprentice, five others, none of whom were employees of the defendant company. The accident occurred between 4 and 4.30. The company was unaware that Oldham possessed any interest in any motor-car, and authorised neither him nor the apprentice to travel to and from their work by motor-car or in any other way than by the means provided, that is to say, by railway train. It appears that on one previous occasion, during the four months that the work was in progress at Heretaunga, Oldham had used the motor-car to go to and return from the work, but this was not known to the defendant company.

Levi and Jackson for plaintiff.
Blair for defendant.

REED, J., found for the defendant. On the interesting questions of law involved the learned Judge said:

In order to render a master liable for a tortious act of his servant the act must be either (1) a wrongful act authorised, either directly or inferentially, by the master, or (2) a wrongful and unauthorised mode of doing an authorised act. It is material, therefore, to enquire what acts the defendant company authorised, what in fact it intended Oldham to have the authority to do. Oldham is working under an award of the Arbitration Court. The award is set out in Volume 25 of the Book of Awards at page 750. Under Sec. 7 (p. 757), if work has to be done beyond a radius of one and a half miles from the employer's place of business, and the work does not come within the definition of Country Work, i.e., work which necessitates the worker lodging elsewhere than at his usual place of residence, the employee must be conveyed to and from his work at the expense of the employer. The employee has to be paid for the time spent in travelling.

What then were the respective duties of Oldham and the defendant? Oldham's duties were to travel to his work by the conveyance provided, i.e., the railway train; to do his work as an electrical fitter upon arrival, and to return by the same conveyance. The defendant's duty was to pay him, for the time occupied from the departure of the conveyance provided until the time at which he should return by that conveyance to Wellington, at the rate prescribed by the award.

It is clear that Oldham was not authorised to travel by motor-car, and a fortiori not authorised to drive a motor-car. But, it is urged, he was authorised to come back to his employer's place of business, and in coming in by motor-car he was guilty of a wrongful and unauthorised mode of doing the act authorised. I do not think that even if his act had been confined to travelling, as a **passenger,** by motor-car, that it could be said that he was doing an act authorised by his master. It is, however, not necessary for me to decide that. The fact is that he was the **driver** of the motor-car, and it was whilst acting in that capacity that he committed the tort. This is an entirely independent act, in no way incidental to the doing of the act that was authorised; he was doing something that he had no authority to do at all. In such circumstances no liability attaches to his employer—the defendant company. The law is clearly stated in 20 **Halsbury** 252 paragraph 601 as follows:

> "The act must be shown to fall within the scope of "the servant's authority as being an act which he was "employed to perform, or at least which was incidental "to his employment; and unless this is established, the "action against the master will fail."

It is perfectly obvious that the driving of a motor-car was not within the scope of Oldham's authority. To be incidental to his employment it must be shown that the act was so closely connected with that which he was authorised to do as to really amount to a mode, though no doubt an improper mode, of performing it. The case usually referred to in this connection is **Beard v. London General Omnibus Coy.** 1900 2 Q.B. 530. In that case the conductor of an omnibus, in the temporary absence of the driver, and apparently for the purpose of turning the bus in the right direction for the next journey, drove it through some by-streets, and negligently ran into and injured the plaintiff. The plaintiff gave no evidence that the conductor was authorised by the defendants to drive the omnibus in the absence of the driver. Judgment was given for the defendants. In **Salmond on Torts** (6th ed.) 102 the learned author comments on that case as follows:

> "Driving an omnibus is not a mode, rightful or wrong-"ful, of performing the duties of a conductor; and the "accident happened, not because the conductor failed to "perform his own duty, but because without authority "he attempted to fulfil that of a driver."

It may be added, that although the act of driving the omnibus was apparently intended to be in the interests of his employer, it was not so incidental to his duties as a conductor, as to make his master liable for his negligence in the performance of it.

In the present case driving a motor-car is not a mode, rightful or wrongful, of performing the duties of an electric fitter, nor is it incidental to those duties or to the duty of travelling to and from his work when the mode of travelling has been prescribed and provided for.

Sim, J. May 26; June 2, 1926.
Dunedin.

KING v. UNION STEAM SHIP CO. OF N.Z., LTD.

Negligence—Contributory negligence—Duty of plaintiff in working on moving machinery—Verdict giving damages yet finding contributory negligence—Whether defective.

The plaintiff sued the defendant for damages for injuries sustained by him in moving machinery. The jury awarded damages, but also found apart from the defendant's negligence that the plaintiff was himself negligent in attempting to oil the bearing of the shaft of the machine without having first stopped the machine. On this finding the plaintiff moved for a new trial on the grounds that the verdict wherein it found him negligent was against the weight of evidence, and also that the verdict was too defective on which a proper judgment could be entered.

Adams for plaintiff.
Callan for defendant.

SIM, J., dismissed the application and entered judgment for the defendant. In the course of his reasons he said:

The plaintiff's attack on the findings of the jury was directed mainly against the answer to issue 2 (a), which finds that the plaintiff was guilty of negligence by attempting to oil the bearing of the shaft without having first stopped the machine. If that answer was justified, then it seems clear that the answer to question 3 (b) was right, for, if the plaintiff had stopped the machine before he started on the business of oiling the bearing, he could not have been injured by the moving cogs.

It is clear, and was not disputed by counsel, that contributory negligence on the part of a plaintiff is an answer to a claim to damages for an injury caused by the neglect of an absolute statutory duty, such as that which existed in the present case: **Groves v. Wimborne**, (1898) 1 Q.B. 402, 419. The question to be determined then is whether or not the answer to issue 2 (a) is one which the jury, viewing the whole of the evidence reasonably, could not properly give. It was admitted that it was the duty of the plaintiff to use due care for his own safety, and the jury were told that the standard by which the plaintiff was to be judged was that of the ordinary prudent workman. It is impossible to believe that, with this direction, the jury did not understand the question which they had to determine, and, in my opinion, counsel's attempt to bring the case within the rule stated by Lord Herschell in **Jones v. Spence**, L.T. 536, must fail.

The jury were entitled to use their own common sense and knowledge of affairs in determining whether or not a prudent workman would set about oiling any part of a machine in motion when he could stop it almost instantaneously by the use of a switch. On questions of fact the jury are not bound to believe the evidence of any witness, although it may be uncontradicted, and when they have to deal with the opinions of experts they are entitled to treat the evidence with even less respect. In view of the nature of the question to be determined and of the evidence on the subject, it is impossible, I think, to say that the answer to issue 2 (a) was one which the jury could not properly have given.

With regard to the other ground on which the motion is based, it is sufficient to say that the finding of damages does not make the verdict defective. It is a common practice to get a jury to assess damages contingently, and the assessment of damages in the present case does not invalidate or conflict in any way with the answers to issues 2 and 3. On the answers to these issues judgment may be entered for the defendant, notwithstanding the assessment of damages: **Lees v. Treweek**, Mac. 513; **Ross v. Reith**, 2 N.Z.J.R. 34.

The result is that the motion is dismissed with costs £7 7s. to be paid to the defendant.

Solicitors for plaintiff: **Adams Bros.**, Dunedin.
Solicitors for defendant: **Callan & Gallaway**, Dunedin.

Alpers, J. May 17, 31, 1926.
Wanganui.

ZIMMERMAN v. THE KING.

Practice—Joinder of defendant—Original defendant The King—Other defendant alleged tort feasor—Cause of action against The King more than 12 months before writ—Crown Suits Act 1908, Sec. 37—Action for fraud—When time runs from—Fraud not discovered for some time after it committed.

This was an argument before Alpers, J., on a question of law, to have determined whether even on the pleadings there was a cause of action disclosed. We take the facts from the reasons of Alpers, J.:

These two matters were heard together. They arise upon a Petition of Right in which the suppliant alleges that in November, 1923, he purchased for the sum of £23 a Jersey bull from one Henry Dowdall, employed as manager of a farm belonging to the respondent, and known as the Piu Settlement Farm. He further alleges that he purchased the bull on the faith of a warranty that it was a pedigree bull. The suppliant made repeated demands for the delivery of a pedigree, and finally, in August, 1924, nearly a year after his purchase, Dowdall supplied him with what purported to be a pedigree—being a list of twenty-six sires and dams whose names are culled at random from classical mythology, Hebrew genealogy, ancient and modern history, and even poetry and fiction. The "pedigree" was obviously a hoax, and the respondent so pleads. The suppliant, however, says he relied upon the original warranty and the pedigree as furnished, allowed the bull to run with his herd, and thereby suffered damage in respect of which he prays that the sum of £550 be paid to him. The petition was filed on the 17th December, 1925. The respondent pleads a general denial of the allegations in the petition, and in the alternative relies upon section 37 of "The Crown Suits Act, 1908," in that the suppliant's claim or demand arose more than twelve months prior to the date on which the petition was filed. To meet this plea the petitioner apparently bethought himself of an alternative cause of action, and two months after delivery of the respondent's plea he filed an amended petition in which he adds to his original claim for the breach of warranty an alternative cause of action for deceit, and he further craves leave to add Dowdall as defendant on the footing of a joint tort-feasor with his "principal"—His Majesty.

C. P. Brown for suppliant.
Izard for respondent.
Gordon for Dowdall.

ALPERS, J., refused to make the order asked for. He said, inter alia:

Dealing first with this summons, I am clearly of opinion that such joinder cannot be made. The very basis of the Crown Suits Act is that His Majesty as of grace permits his subjects to petition for redress of grievances, in certain cases, in his own Courts, and allows their petition to be heard and determined by his own Judges as though he were himself a subject. To permit a suppliant to join with His Majesty as co-defendant one of his subjects as a joint tort feasor stands not with his dignity, nor is it warranted by the terms of the statute. It is true that in England, by section 5 of "The Petitions of Right Act, 1860," in cases where the real or personal property, or any right in or to the same, which is in dispute, has been "granted away or disposed of by or on behalf of the sovereign or his predecessors," it is provided that a copy of the petition and fiat shall be served upon the person in possession, occupation or enjoyment of such right, endorsed with a notice requiring such person to appear and plead. But that is not this case nor is there any corresponding provision in our Crown Suits Act. Counsel for petitioner concedes that a subject could not be joined as co-defendant with His Majesty in the original petition, but urges that under the terms of section 34 the joinder, as a mere matter of procedure, may be made after the petition is once launched. But that section is strictly limited by its opening sentence "So far as the same may be applicable," and it is abundantly clear that the procedure for joinder is not applicable, but is in direct conflict with the spirit and intention as well as with the "machinery provisions" of the Act. This summons is therefore dismissed with £3 3s. costs and disbursements to the respondent, and £5 5s. costs and disbursements to the proposed extra defendant Dowdall.

Dealing with the matter as to when the time begins for the purposes of bringing the action, the learned Judge said: The petitioner contends that his "claim or demand" did not arise till he discovered the alleged fraud, and that his time for filing his petition should therefore be enlarged on the analogy of the equitable doctrine applied in cases of "concealed fraud," where the Statute of Limitation is pleaded in bar. This contention, it seems to me, is vitiated by the confusion of thought pointed out by **Brett, L.J.**, in **Gibbs v. Guild (1882 9 Q.B.D. 59 at page 69).** "It seems to "me that there is some little confusion in the expressions "used in some cases as to the origin of the cause of action "being a fraud. That is not the fraud which raised the "equity: but if there was a cause of action and if its existence was fraudulently concealed from the plaintiff by the "defendant who had given that cause of action, it was then "that the plaintiff's equity arose notwithstanding that this "cause of action had arisen more than six years before."

The contention also involves a confusion between section 37 and the ordinary Statutes of Limitation.

The ground principle of our Crown Suits Act, as of the English "Petitions of Right Act," is a gift to the subject of a right to sue His Majesty in His Courts, in certain circumstances and under certain conditions. The enabling clause in our legislation is section 3 of "The Crown Suits Amendment Act, 1910," which reads as follows:

> "Subject to the provisions hereinafter or in the principal Act contained, a claim or demand may be made "against His Majesty by a Petition under part II of the "principal Act in respect of the following causes of action,"

and then follow specific causes of action. One of the provisions of the principal Act to which this enabling clause is expressly made subject is section 37: "No person shall "be entitled to prosecute or enforce any claim under this "part of the Act unless the Petition setting forth the relief "sought is filed within twelve months after the claim or "demand has arisen." The provision of section 37 of the principal Act is therefore a condition upon which the right given by section 3 of the Amendment Act of 1910 to institute proceedings against the Crown is given, and compliance with it is the basis of that right. The function of section 37 is therefore fundamentally different from a Statute of Limitations: it is not to bar an existing right, but to prevent a subject from resorting to the special procedure conceded to him by the Statute unless he brings his petition within the time specified as a condition under which alone he may bring it at all. To apply the equitable doctrine of "concealed fraud" to such a provision would be to act in direct opposition to the express wording of the Act.

A similar question was reviewed by the High Court of Australia in "**The Crown v. McNeil (31 C.L.R. 76).**" This was an appeal from the Supreme Court of Western Australia and involved, among other questions, the application of a clause of "The Crown Suits Act 1898" of that State. The clause is identical in its language and even in its number with our section 37. In the course of his judgment **Isaacs, J.**, says (at p. 99): "The Crown contends that this section "is imperative and unless its terms are complied with the "action is incompetent. The respondents contend, and "Burnside, J., agreed with them, that fraudulent concealment of the cause of action extends the period indefinitely, "until the fraud is discovered.

"The Crown's view seems to me clearly right. The Act "is of the class described by Sir Barnes Peacock for the "Privy Council in **Farnell v. Bowman (1887), 12 App. Cas., "at p. 650.** It is an Act described as establishing a process "'opening a larger range of remedies to the subject' as "distinguished from 'that of amending procedure without "'any enlargement of remedy.' The King with the advice "of his Parliament of Western Australia grants to his subjects the greater facilities and the range of remedies and "advantages of procedure which are detailed in the Act. "But he limits his grant both as to the nature of the claim "and the time in which it can be presented. These are the "express conditions of Parliament. What right or power "has any Court to disregard the condition as to time and "by any rule or doctrine of its own add an alternative "period in the case of fraud? And more especially in the "case of fraud of some subordinate officers—not His Majesty's advisers. I frankly say I cannot understand the "contention."

In **Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswani (1893), L.R. 20 Ind. App., 183, at p. 192, Sir Richard Couch** in the Privy Council said: "The intention of the law "of Limitation is, not to give a right where there is not "one, but to interpose a bar after a certain period to a "suit to enforce an existing right." Section 37, though often referred to in loose language as an additional "Statute of Limitation," is in its character and essence nothing of the kind. It is a condition of a gift, and unless that condition is fulfilled the gift can never take effect. The question of law propounded for argument is therefore answered in the negative. Costs allowed to respondent, £12 12s, and disbursements.

Solicitors:
Broadfoot and Mackersey, Te Kuiti, for suppliant.
The Crown Solicitor, Wanganui, for respondent.
Treadwell, Gordon & Treadwell, Wanganui, for Dowdall.

Sim, J.
Adams, J.
MacGregor, J.

April 15, 20, 26, 1926.
Wellington.

THE KING v. LAWRY AND CARTER.

Wardens Court—Jurisdiction to Grant Sawmill Licenses—State forests—Mining Act, Sec. 149—Mining Amendment Act, 1922, Sec. 3—Purpose of—Forests Amendment Act, 1925, Sec. 2—Effect of—Mining Act, 1908, Sec. 35.

This was a motion to move into the Supreme Court for the purpose of quashing an application for a sawmill license and two applications for certificates of reservation of timber areas.

The facts are not material for the purposes of this note. It is important to note that the effect of this decision has put an end to an erroneous practice that has prevailed in the Westland district for about 25 years, for wardens to assume authority beyond the scope allowed them by Sec. 149 of the Mining Act 1908.

Fair, K.C., Solicitor-General, and **Kitchingham,** for plaintiff.
Sir John Findlay, K.C., and **Wilson,** for defendants.

THE COURT gave judgment for the plaintiff. ADAMS, J., delivered the judgment of the Court, in which he said, inter alia:

The first question we propose to discuss is the jurisdiction of the warden when acting on behalf of a Land Board in pursuance of an authority and direction of the Governor-General under Section 149 of the Mining Act 1908. In our opinion there is no room for doubt that when so acting he must keep within the powers given to Land Boards by Section 352 of the Land Act 1924. He is acting under a delegated power, and his jurisdiction is limited by the terms of the power. The law upon that is, we think, too clear to permit of argument to the contrary. In this case the warden, apparently following the erroneous practice which is said to have been followed since the year 1900, when the Land Board timber-area was first defined, has ignored the provisions of Sections 147 and 149 relating to Land Board timber-areas, and has dealt with the applications as applications under the Mining Act in respect of warden's timber-areas. It does not appear whether any Land Board timber-areas have been defined in other mining districts, or that the practice adopted in this instance has been followed in any other mining district; but it is obvious that the powers of the wardens cannot be extended by an erroneous interpretation of the Statute under which they are conferred, though such interpretation has been acted upon for upwards of 25 years, as is alleged in this case. The provisions of paragraph (b) of Section 149, that rights granted by the warden on behalf of the Land Board shall operate and have effect as timber-cutting rights granted under the Mining Act, like paragraph 11 of regulation 110, which was discussed and explained in **Rex v. Malfroy,** 1924 G.L.R. 651, deals only with the operation of a license when granted by a warden.

Now rights in respect of lands in a Land Board timber-area are to be dealt with under Sections 347 and 352 of the Land Act 1924 exclusively (Section 147 Mining Act 1908). Section 352 of the Land Act relates to timber licenses, and authorises the Land Board, with the approval of the Minister of Lands, on the application of any person, to (1) set aside any area or areas of timber-bearing land not exceeding 1500 acres; (2) with such approval, to grant licenses to cut

and remove timber over areas not exceeding 200 acres at any one time; and provides (3) that no license after the first shall be issued without a certificate of a ranger, or person appointed in that behalf, that the marketable timber has been properly cut and cleared off the areas included in previous licenses. In this case the warden has purported to grant the license and certificates without the approval of the Minister, and to grant the license before making the reservation, and for an area of 382 acres. The warden had no jurisdiction to do this and the license and certificates are therefore void.

His Honour further said that the only jurisdiction of the warden to grant timber-cutting rights in respect of lands within a State forest is that given by Sec. 20 of the Mining Act, and is confined to grants for mining purposes.

With regard to the difficulty created by Sec. 3 of the Mining Amendment Act 1922, the learned Judge said:

We think, however, that the purpose of that section probably was to save the powers of the warden under Section 20, Mining Act 1908, from the sweeping effect of the sections of the Forest Act 1921-22, to which reference has been made. It is obvious that, without any further legislation than is contained in Section 35, any application of Sections 147 to 152 of the Mining Act with respect to lands in a State forest must be subject to that Section, but for the reasons given we think it is equally obvious that any application of those sections to the lands of a State forest is negatived by the plain language of the Forests Act. An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it.—**Land Board of Otago v. Higgins**—3 N.Z.L.R. (C.A.) 66. The reference is to the following passage in the judgment at pp. 88, 89:

"We have before now had to assert the distinction between an indication of opinion on the part of the Legislature as to what the law is or has been, and an exercise of legislative authority to make the law that which it is assumed to be. It is open to a Court of Judicature to question the mere opinion. The distinction is drawn in **Lundon v. Whittaker's** case. It is curious and satisfactory to observe that this same principle, that the opinion of the Legislature is not conclusive evidence of the law, was within a few weeks after the decision of this Court applied by the Judicial Committee of the Privy Council even to an Act of the Imperial Parliament in the case of **Mollwo, March and Coy. v. The Court of Wards**, L.R., 4 P.C. 419. The decision of the Privy Council was cited and relied upon by the late Master of the Rolls in **Pooley v. Driver**, 5 Ch. Div. 458; 46 L.J. 466; 36 L.T. 79. Were it necessary this Court would, I apprehend, be prepared to act upon this principle by denying legislative force to the incidental use of the phrase on which the appellants lay so much stress."

Section 8 of the Forests Amendment Act 1925, which came into force after these rights had been granted, repeals Section 35 and re-enacts it with certain additions and in different language.

The words "granted by the Warden under the provisions of the Mining Act, 1908," in Section 35, must be construed according to their ordinary meaning, and the Section prohibited any such grants by a warden except for strictly mining purposes. The jurisdiction of the warden to grant such rights on behalf of a Land Board derives from Section 149 and the authority and direction of the Governor-General together; in the absence of either the jurisdiction would not arise. The rights are therefore grantable, and, if valid, are granted, under the provisions of the Mining Act. The decision of the Court of Appeal in **Elve v. Poyton**—(1891) 1 Ch. 501—is sufficient authority for this conclusion. The license is therefore void as contravening Section 35 of the Forests Act.

Reed, J. Wellington.

IN RE MICHAEL BRANDON, DECEASED.

Will—Attestation—Execution by mark—Proper attestation clause.

This was a motion ex parte for probate. Testator had made his mark in executing the will. The attestation clause concluded as follows: "the same having been first read over to him in our presence, when he appeared perfectly to understand the same."

Parkinson in support.

REED, J., said it was necessary to have evidence as to the reason for the testator signing by making his mark. If the reason was bodily weakness, the statement in the attestation clause was insufficient to satisfy Rule 522.

Ostler, J. April 28; May 15, 1926. Wellington.

TIMMINGS v. TREADGOLD.

Practice—Striking out statement of claim—Action based on fraud—Contract—Rescission—Subsequent bankruptcy of plaintiff—Cause of action touched bankrupt's estate—Subsequent discharge—No assignment from Official Assignee back to plaintiff—Whether action abuse of procedure.

This was a summons on the part of the defendant to have the statement of claim struck out as an abuse of procedure. Shortly, the facts were as follows: Timmings sued defendant for rescission of contract entered into in 1908. Plaintiff went bankrupt in November, 1911. Before his discharge he sued Treadgold on the same cause as alleged in this action. Official Assignee refused to join in. Reed, J., held in that action, Timmings v. Treadgold, 1923 N.Z.L.R. 73, that plaintiff had no cause of action. Plaintiff received his discharge in bankruptcy in 1925, and later began this action.

Kennedy in support of summons.

Plaintiff in person to oppose.

OSTLER, J., made the order asked for. He held that the right of action had vested in the Official Assignee on bankruptcy and it has not been assigned to Timmings. It still remained in the Official Assignee.

MARRIED WOMEN AND THE LAW

(By Sir Robert Stout, P.C., K.C.M.G., D.C.L., LL.D.)

On my taking leave of the Bar in Wellington, I stated that there were many matters that required consideration in altering some of our existing laws. I mentioned the question of domicile in divorce cases. I have been asked to state generally what were the alterations to which I referred.

The granting of rights to women has been a slow process. At one time a married woman was looked upon as almost a slave or a vassal, and it has only been in recent years that her rights have been recognised. In olden times it was thought that the husband had power to punish her and thrash her. That was denied not so many years ago by one of the highest Courts in England, but in the end of the last century and in this century her position has been greatly altered. England and New Zealand have passed a Married Woman's Property Protection Act. She can even now be a partner with her husband in business; she has a right to her own property; her husband cannot take it from her, and her property does not by marriage pass to her husband except with her consent. She has also been granted the rights of citizenship. Both in England and in New Zealand she can vote at the election of members of Parliament and for members of local bodies. In England married women have been elected to the House of Commons, and in other countries of the world the same thing has happened. In America we have women Judges, and in England we have women Justices of the Peace and women on Juries. There has therefore been an entire change of the position of women within the last fifty years.

The question is, are there any other rights that ought to be granted to women? There is one question which is rather a pressing one, and that is what is to happen to a woman if her husband deserts her or treats her cruelly or commits a marital offence aganist her? To whom can she apply for redress? If, for example, a New Zealand woman is deserted by her husband and

her husband leaves New Zealand and goes to Australia or to America or to India or to any foreign country, what can she do? Though perhaps she is a Native of New Zealand and one who has lived all her life in New Zealand, can she appeal to a New Zealand Court to grant her redress and to grant a divorce for the misconduct of her husband? It has been held that her husband can only be sued in his own domicile because she has no domicile of her own. His domicile is her domicile, and she cannot create a domicile for herself. This was decided in one very important case by the Privy Council, namely, the case of "**Le Mesurier v. Le Mesurier**" reported in 1895 Appeal Cases, page 517. That was a case that was tried in Ceylon. The husband was in Ceylon, but he was not domiciled there, and it was held that the Courts of Ceylon had no power to grant a divorce. The decision given in that case is looked upon as the ruling decision, and the result is that it is only the Court in the place where the husband is domiciled that can grant a divorce. The rule was different in Scotland, but the Scottish cases that had granted divorce otherwise were held not to be good law in the case that has been named. It may be that the law as laid down in Bell's Principles of Scotch Law (paragraph 1535) is yet good law in Scotland. There it is stated as follows:—

"The party complained against must be within Scotland, or if absence abroad is part of the offence, personal notice must be given unless by concealment and ignorance of the place of residence that is rendered impossible."

If, as it has been said, even in Scotland, the husband being domiciled in Scotland, deserts his wife and commits adultery, and thereupon acquires a foreign domicile, the wife is not entitled to her remedy in Scotland, and "Le Mesurier v. Le Mesurier" upholds that position. In America decisions have been given both ways, and in Bishop's Law of Husband and Wife, paragraph 157, it is said:—

"The wife is not capable of establishing a separate domicile of her own. An exception admitted by the better authorities but denied by others is that for purposes of jurisdiction in divorce cases the domicile may be separated."

That, no doubt, was formerly the Scottish law as well as the law in some of the States of the Union, but as has been said, the decision in "Le Mesurier v. Le Mesurier" does not allow it to be contended that that would be the law in England.

Is it fair then that a married woman should be placed in this position: suppose a New Zealand woman born in New Zealand, lived all her life in New Zealand, married in New Zealand, is deserted by her husband, who has refused to maintain her and who has committed adultery, we will say, in America, what can the woman do to obtain a divorce? She cannot sue in New Zealand; her only remedy would be to go to America, where her husband is domiciled, if he has got a domicile there, and to appeal to the Courts where he resides. Surely that is a most unfair position in which to place a married woman, and ought not, at all events, the Scotch law to be made the law in New Zealand, namely, that if the husband has deserted his wife she should be able to have a remedy in the Courts where she is domiciled. This is a very pressing matter, and it ought to have been dealt with by our Parliament long ago.

It is true that the question may be raised, as was raised regarding a bigamy case, that our Parliament might have no jurisdiction to deal with the question of domicile. Our Parliament dealt with the question of bigamy in the Crimes Act of 1908, and it laid down this rule: "The act of a person who, being married, goes through the form of marriage with any other person in any part of the world, commits bigamy." Our Court of Appeal, however, held that this was beyond the power of the New Zealand Parliament to enact, that all that the New Zealand Parliament could do would be to declare that a man was guilty of bigamy who, being married, goes through the form of marriage with any other person in New Zealand, not in any part of the world. By that decision the powers of the New Zealand Parliament were more limited than the powers of the English Parliament. In England the law is as stated in our New Zealand statute, and the New Zealand Parliament was supposed to have power to enact all laws that were necessary for the good government of New Zealand. The New Zealand Court of Appeal, however, held that it could not enact the same law as the English Parliament could, and it may be that unless there is express statutory power given by the English Parliament to New Zealand to pass a law dealing with domicile and the jurisdiction of Courts in enforcing the remedy of divorce for misconduct in the widest possible way, that the New Zealand Parliament cannot enact a law stating that a woman can get a separate domicile. Surely this is a matter that requires instant consideration.

Married women are placed in a very peculiar position by our existing law. It is true, as it has been said, that our existing law is very kind to married women.

In one late case that has come before the Courts in New Zealand a married woman and her husband were found guilty by a jury of conspiracy. The Court of Appeal, however, held that a married woman is not able to conspire with her husband because she has no will of her own, and she is not a "person" in the eye of the law. Our statute says, for example:—

"Everyone is liable to two years imprisonment with hard labour who conspires with any other person by false pretences or false representations or for fraudulent means to induce any woman or girl to commit adultery or fornication."

A jury found a man and his wife guilty under this statute, but the Court of Appeal held that they could not be guilty because it was said a married woman is not "a person"; she is under the control of her husband and is not what may be termed a different entity or a different person in the eye of the law.

A leading English authority—Eversley—in his book on "Domestic Relations," said as follows:—

"It is said that a husband and wife cannot be indicted for a conspiracy because they are deemed to be one person in law and have but one will, but it is doubtful now whether that proposition would be held to be good if it was shown that the agency of the wife was as active as that of the husband."

This opinion of Eversley was not accepted by the Court of Appeal.

There was not brought before the Court of Appeal—as the papers had not reached New Zealand when the case was heard—an interesting discussion that took place in the House of Commons when the "Criminal Justice Bill, 1925" was before the House. This appears in the English "Hansard" of Friday, 20th November, 1925. The Solicitor-General there said:—

"I take it that the House will probably desire that there should be no difference of opinion on a purely legal question, and I think it would probably accept the statement of the law, which is quite short, which was drawn up by Mr. Justice Avory's Committee, on which the late Sir Richard Muir, Sir Travers Humphreys, and the Director of Public Prosecutions himself, as well

as other learned judicial persons, sat. If the House will allow me to read this statement, it will be in full possession of the law as it stands to-day. The statement is this :—

'In the case of crimes committed by the wife in the presence of her husband the presumption of coercion which excuses the wife, has no application to the crimes of murder or treason, but is held to apply to all other felonies and to all misdemeanours.

'The doctrine of coercion as applied to such crimes committed by the wife in the presence of the husband only raises a *prima facie* presumption, which is capable of being rebutted in all cases by the evidence, and if it should appear in any particular case that the wife has done some independent act from which the inference can be drawn that she was acting voluntarily and not under the coercion of the husband, the case against her must be left to the jury to determine whether she was in fact acting voluntarily or under his coercion.'"

In order to alter the law the Solicitor-General proposed, and it was carried :—

"Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of her husband is hereby abolished, but on a charge against the wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of and under the coercion of her husband."

(See Section 47 "Criminal Justice Act, 1925.").

Can it be said that our law is different from that which the English Parliament enacted ? Our Act provides (see section 44 subsection 2, Crimes Act, 1908) :—

"Where a married woman commits an offence, the fact that her husband was present at the commission thereof shall not of itself raise the presumption of compulsion."

That leaves a married woman power to prove that she was compelled, but it was not to be presumed without proof. The Court of Appeal, however, held that this provision—and I suppose it would also have held the same with regard to the English provision—was not applicable because a married woman is not "a person," that she has no will of her own, that her will is dominated by her husband, and even if she and her husband had conspired to murder she would not be liable for any offence nor would her husband because there could be no conspiracy unless there were two persons. In this respect it may be said that our law is more kindly to the married woman than the English law, but it is kindness at the expense of what ? Of declaring that she is not "a person," that she has no will of her own, and that she is still under the dominance of her husband even in matters of crime.

Is that a satisfactory position to place any woman in ? It was not thought so when the matter was discussed in the House of Commons. One of the ablest members present in the House of Commons during the discussion was the late Right Hon. Mr. Rawlinson, who was a member for the University of Cambridge, a King's Counsel, and who had been a law lecturer and held various official positions. He died a few months ago. He asked that no concession should be granted to a married woman that was not granted to her husband. He said (referring to the quotations made by the Solicitor-General) :—

"There is nobody except, perhaps, Sir Harry Poland who has had greater experience of the criminal law than that learned Judge. That being so, why do we not accept this definition ? It comes from experienced lawyers, and it is good sense. Can honourable Members imagine anything more ridiculous than to suggest that there should be a power given to a wife to say, 'I acted under the coercion of my husband,' which is not allowed to any other human being to say in respect to anyone else ? The Bill proposes to do this."

Mr. Rawlinson, I am afraid, could not have imagined that the point that was raised in our Court of Appeal could be taken, namely, that a woman could not conspire with her husband to commit a crime. To leave a married woman in that position is surely not for her honour, and this, no doubt, could be amended by our law.

Of course, I must assume that the Court of Appeal was right in its decision, and that this old law—a married woman not being a person cannot in a conspiracy case be held to conspire with her husband—is still in existence. I believe the case relied upon in which it was so held is dated in the reign of Edward III.

There are other instances in which married women have not yet obtained their proper and right position. One is the question of appointing them as Justices of the Peace, and even as Judges, and the time must come when we will have to pass Acts recognising that men and women are equal in the eye of the law and both are entitled to the same privileges. Until that is granted there will be—and properly so—a continual agitation for the granting to women of their rights. We are in many respects behind England, behind many of the States of America and behind even many of the States in Europe in this respect. Our New Zealand women have not the rights and privileges of their sisters in many other countries.

LONDON LETTER.

Temple, London,
31st March, 1926.

My Dear N.Z.,—

I hope I am guilty of no excessive egoism in devoting my first observations to a case in which I was engaged myself on Monday and Tuesday as much to my own surprise as to the amusement of Mr. Justice Rowlatt, who revelled in the quaint proceedings. Fifty or a hundred years ago, as the learned Judge (whose legal scholarship will be known to you) remarked, the litigation would have been entirely normal and universally appreciated. Nowadays, however, it is at least unusual that two parties, the one being a hard-headed man of business and the other a solicitor of a highly reputable and busy firm, should stubbornly fight out an action the material point of which was as to who should pay a sum of money amounting to something less than five pounds ? There was no temper involved, and no animus ; indeed, before the trouble began they had never heard of each other's existence and before they met in Court, the day before yesterday, they had never set eyes on each other. In a civil and even courteous correspondence, each of them had taken his stand upon a point of law, and that point both of them were from first to last determined, as they justly might, to litigate. And it was a good point, too ! Here it is, the name of the case being **Kersey v. Kinnersley.**

A testator devised his London house in the first place to trustees on trust to allow his widow, should she choose to live there, to have the personal use and enjoyment of it during her widowhood. He made a similar disposition of the "heirlooms," and he further bequeathed the furniture, linen and so on to the trustees, upon a

similar trust. Upon the cesser of the widow's interest, he bequeathed the furniture absolutely to which ever of his sons elected to reside in the house. This son was in fact my client, the plaintiff. For ten years or so, the widow lived in the house and profited by the trust. She then went to live with her daughter at Bath and proposed to avail herself of tenant-for-life's power of sale, under the Settled Land Acts. Thereupon the trustees took out an originating summons, upon which Eve, J., declared as follows:—(1.) With her leaving of the house, the widow's interest in the house and heirlooms determined; but (2) all parties, including my client consenting, she might have the use of such of the furniture as she selected. She selected some eighty pounds' worth, and took it away to Bath.

In December, 1924, the widow died. The plaintiff was by that time residing in the London house and was absolute owner of all the furniture. He waited some six months for his furniture to come back to him, from Bath, and then wrote to the widow's executor, the defendant in this action, asking for its return. Defendant said he would enquire into the matter, and after three months wrote: "I am happy to inform you that your furniture has now been deposited in your name with Messrs. B., auctioneers, Bath." The plaintiff claimed that the furniture should be returned to the London house; the defendant claimed to be discharged from any further obligation. Which was right? That is a question which can only be answered at once, by instinct, or after a prolonged and arduous investigation of first principles, if the answer is to be reasoned.

Rowlatt, J., having at first observed that this was an action which ought to have been tried out in the time of the Year Books, found himself ultimately discussing, with all seriousness and of a real necessity, the origin of the action in detinue, detinue sur bailment, detinue sur trover: it was also inevitable to go back to first principles as to the rights which may exist in personal property in order to ascertain the obligation of an executor as to a chattel interest of the deceased, which lasted up till, but terminated at, the moment of her death. And at long last we found ourselves actually delving into the Year Books, in fact, to discover against whom detinue lies and what is the result of it, when and if the plaintiff wins? The result of an even contest, going over the two days, was that the plaintiff won on the strength of the defensant's "conversion" which had been committed by the natural but unjustifiable act of depositing the furniture with a third person. Throughout the trial, Rowlatt, J. was at his breeziest and best.

Lowther v. Clifford, now reported in the Law Reports (1926), 1 K.B. 185, came under the review of the Court of Appeal last week and the judgment of Mr. Justice McCardie was affirmed; it turns, as you will remember or remind yourself, upon the construction and exact interpretation of a covenant in a lease "to pay assessments, impositions and outgoings." Though it involved expenses arising under acts of a quasi-local nature, it states some principles which may be of importance to you. McCardie, J., never fails to explain some general principles when giving judgment upon any matter, however particular. On the same day, the other Court of Appeal allowed an appeal from the same Judge of first instance in the insurance case: **Lake v. Simmons,** to which I think interest attaches. A jeweller claimed against underwriters on a policy of assurance against loss, from which was excepted "loss by theft or dishonesty committed by any customer in respect of goods entrusted to him by the assured." McCardie, J. took the view, with which Atkin, L.J. in a dissenting judgment agreed, that the exception could not apply to the instance of a theft by a customer who had been convicted of "obtaining" the stolen goods "by false pretences." How, said they, could there be an "entrusting" in the case of a person who had obtained by false pretences? Bankes and Warrington, L.JJ., took what is known in these practical, and not always exact, days as "the broad view." The intention of the contracting parties, they held, must not be arrived at by the process of interpreting such words as "entrusted" by the strict processes of the criminal law; the exception was intended to cover all cases of misplaced confidence, of which this was one. Whatever the word "entrusted" may mean, it does not apparently mean, on their Lordships' ruling, "entrusted."

A decision which gives rise to much remark, not of any hostile nature, is the criminal appeal in **Rex v. Denyer.** An association of traders took upon themselves the keeping up of the retailing price of a certain commodity, as against the public. We all suffer by such combinations, but must suffer in silence for the most part, since the end may be achieved without breaking the law, so long as the retailers remain (if I may say so) as thick as thieves. There is, however, a limit to be observed, in the operations of the association to discipline its members. The system adopted is, as you know, to constitute a "Stop list" upon which is put the name of any member who does not maintain the association price, and any retailer on the "Stop list" is likely to have difficulty in dealing with the wholesalers. A retailer of the commodity sold at less than the association price, and the "Stop list" superintendent, the appellant, had to write to him about it. The letter said that the council of the association had considered the case and that it offered the retailer the option of paying a fine of £250 or of being put on to the "Stop list." The superintendent was convicted and his appeal failed; the letter was an attempt to obtain money by a menace, notwithstanding the authority, duly quoted, by which "stop-lists" are legally indemnified.

The decision in **Hilton v. Westminster Bank** also emanates from the Court of Appeal presided over by Lord Justice Bankes, and it is questionable whether it, or Mr. Justice Horridge's conclusion which it reversed, is sound? A customer telegraphed instructions to his bank to stop the cashing of a post-dated cheque, but gave the wrong number in the telegram. Later he spoke to a cashier of the bank, over the telephone, and that conversation was, it was held, enough to warn the official, who took part in it, that there might be some mistake, some need to enquire as to the number of the stopped cheque. In due course the cheque, intended to be stopped but mistakenly named in the telegram, was presented and the manager ordered it to be cashed. The claim for damages arose as upon negligence, the occasion for it being that, as a result of the cashing of the stopped cheque, there were not funds to meet a subsequent cheque payment of which was accordingly refused. To hold the bank liable as in negligence, the Court of Appeal had first to make the telegram a good instruction to stop, and next to impose upon the bank the duty of making enquiries into the matter as a result of a conversation over the telephone with the cashier. Horridge, J. did not see his way to come to either of these conclusions, and, short of a positive instruction by telephone directly confirming the telegram and correcting the mistake, it is not easy to see how any court could do so? However, the case is obviously one of fact, for a large part, and criticism is perhaps not permissible when based (as I confess that my know-

ledge of this particular case is based) upon a newspaper report.

The Apple case, to which I have many times referred (**Bradley and Sons Ltd. v. The Federal Steam Navigation Co. Ltd.**) was decided, Atkin, L.J. again dissenting, by dismissal of the appeal from the judgment of Branson, J. as to the disease of "brown-heart" in the cargo and the ship-owners' responsibility for it. The blame rests with the apples and not with the ship-owners, unless and until the House of Lords is asked and persuaded to take a different view. Much of Atkin, L.J.'s dissenting is due to Atkin, L.J. being right but not all of it.

The defamation case, **Bowen Rowlands v. The Argus Press and Another** is to be noted, not as raising any new point but as affording an illustration, a precedent and an interpretation of particular words. You will probably agree with me that, having regard to the technical element of "innuendo," much of our learning in the matter of defamation consists of an accumulation of instances, which have all the appearance of being purely matters of fact. The gist of this case is, what does the statement, that a tale told is a "pure invention," import and what, if any, personal reflection does it contain upon the teller? Plaintiff wrote a book about Mr. Charles Bradlaugh, and the book was in due routine sent out to newspapers for review. Defendants' reviewer quoted a passage from it and the passage was a tale about Mr. Bradlaugh not calculated to flatter him or please his descendants. One of the latter wrote a letter to defendants for publication, and defendants duly published it as such; the letter stated that the tale was a pure invention, entirely false and likely to give as much pain to the living as it did injustice to the dead. Plaintiff sued in damages in libel, asserting the natural meaning of the words in the letter to be that he (plaintiff) was a liar and had wickedly concocted the whole story. The occasion was held to be privileged, and the plaintiff asserted such obvious "malice" as to negative the privilege. The Lord Chief Justice held that there was no evidence of such malice and the Court of Appeal has upheld the Lord Chief Justice. The phrase, therefore, is to be added to the many phrases and words dealt with by the textwriters, such as Fraser, in discoursing upon what is defamatory and what is not defamatory.

I may remind you that the case of **Jagger v. Jagger,** which I recently described to you in its hearing at first instance before Hill, J., has achieved no alteration on its appeal. You will recall that it dealt, but not helpfully so far as she was concerned, with the attempt of a wife, who had divorced her husband, to prevent his defeating her maintenance rights through the medium of a settlement of all his assets upon another woman, whom he was next marrying. Observe that Hill, J. dealt with the case no more than a month and a week before the Court of Appeal re-dealt with it. That shows a novel and unusual state of affairs as to the lists of the Court of Appeal, does it not? I heard to-day that a friend of mine settled the endorsement of a writ last Saturday in a case in which judgment was delivered yesterday! It goes without saying that there was some artificial expedition and acceleration here, but it shows how the lists stand that such was possible. I advised an action on January 5th last, in which there has been no expediting and nothing artificial, other than prompt proceeding on both sides. We are to be tried on the first day of next term, which, for a special jury case, is not the going of a year or two ago. The coming terms will increase progressively in quiet times for the Bar and quick times for the litigants.

In the case of **Ruapehu,** decided by Hill, J. in the Admiralty Division on Monday last, it has been reaffirmed that the limitation of a dockowner's liability, provided by section 2 of our Merchant Shipping Act, 1900, only applies to liability incurred by them, as dockowners and in the management of their dock or of ships in relation to their dock, and does not apply to a liability incurred in doing other work, such as the repairing of a ship. Where dockowners' servants, therefore, were so negligent in such a work, as to cause damage to the ship under repair, by fire, the dockowners' liability must be the same as would be yours or mine.

And with that I bring this letter to an end, collect my bag, give some hasty directions to my clerk as to my whereabouts for the Easter period and, by your leave and with the promise to complete my next letter with some cases omitted from this, am off for the Easter Vacation. The Courts rise to-day, and will only just have resumed sittings, when next I write.

Yours ever,
INNER TEMPLAR.

THE CONVEYANCER

COVENANT IN SECOND MORTGAGE TO PERFORM COVENANTS, ETC., IN FIRST MORTGAGE.

And the mortgagor doth hereby further covenant with the mortgagee that the mortgagor will henceforth and from time to time and at all times during the continuance of this mortgage perform and observe all and every of the covenants whether for payment of principal or interest or otherwise conditions or agreements in the said Memorandum of Mortgage hereinbefore referred to contained or implied or on the part of the mortgagor to be performed or observed AND that if the mortgagor shall make default in the performance or observance of the said covenants conditions or agreements or any of them it shall be lawful for but not obligatory on the mortgagee to perform or observe the same and the mortgagor will forthwith without any demand pay to the mortgagee all sums of money so expended in so doing with interest for the same respectively at the rate of £10 p.c. p.a. computed from the time or respective times of advancing or paying the same and in the meantime such sums of money with interest at the rate aforesaid shall be a charge upon the said lands and premises and be included in this security.

COVENANT IN MORTGAGE TO OBSERVE COVENANTS IN LEASE.

And the mortgagor doth hereby for himself his executors administrators and assigns covenant with the mortgagee his executors administrators and assigns that the hereinbefore recited Lease is now a valid and subsisting lease of the said premises thereby leased and is in no wise void nor voidable AND that the rent and all the covenants by the Lessee and conditions by and in the said Lease reserved and contained have been paid performed and observed up to the date of these presents AND ALSO that he the mortgagor will so long as any money shall remain owing on the security of these presents pay the said yearly rent made payable by the said Lease and will perform and observe all the covenants by the lessee and conditions in the said lease contained and keep the mortgagee his executors administrators and assigns indemnified against all actions suits proceedings costs damage claims and demands which may be incurred or sustained by reason of the non-payment of the said rent or any part thereof or the breach non-performance or non-observance of the said covenants and conditions or any of them AND THAT if the mortgagor his executors administrators and assigns shall make default in the payment of the said rent or any part thereof or in the performance or observance of the said covenants or conditions or any of them it shall be lawful for but not obligatory on the mortgagee his executors administrators or assigns and the Mortgagor doth here-

by expressly authorise him or them to pay the said rent as aforesaid and to perform and observe the said covenants and conditions or any of them and to pay all moneys charges and expenses necessary in so doing AND the mortgagor his executors administrators or assigns will forthwith without any demand pay to the mortgagee his executors administrators or assigns all sums of money charges and expenses expended or incurred by him or them in or about the payment of the said rent or any part thereof or in or about the performance or observance of the said covenants and conditions or any of them with interest for the same respectively at the rate of £10 per centum per annum computed from the time or respective times of the same being advanced paid or incurred AND in the meantime such sums of money charges and expenses expended or incurred as aforesaid shall be a charge upon the mortgaged premises and be included in this security.

N.Z. LAW SOCIETY.

At the last annual meeting of the Council of the New Zealand Law Society there were present:—Mr. R. McVeagh, Auckland; Messrs. F. W. Johnston and H. F. O'Leary, Canterbury; Mr. Wm. Perry (proxy), Gisborne; Mr. P. H. Watts, Hamilton; Mr. E. F. Hadfield, Hawke's Bay; Mr J. Glasgow, Nelson, Mr. R. H. Webb, Otago; Mr. P. Levi, Southland; Mr. G. M. Spence, Taranaki; Mr. C. P. Brown, Wanganui; Sir John Findlay, K.C., Westland; Messrs. A. Gray, K.C. (president), A. W. Blair, C. H. Treadwell (vice-president), Wellington.

The officers elected for the year 1926 are:—President, Mr. A. Gray, K.C.; vice-president, Mr. C. H. Treadwell; hon. treasurer, Mr. P. Levi (re-elected); auditors, Messrs. Clarke, Menzies, Griffin and Ross (re-elected).

Mr. C. P. Skerrett, K.C., who had been President, on his appointment to Chief Justice resigned his position as President. We publish his letter to the Council and the resolution passed in connexion with the matter:—

"Please convey to the Council of the Society my resignation of the office of President of the Society, consequent on my appointment as Chief Justice of New Zealand.

"In bidding farewell to members of the Council, I desire to say that I shall always look back with pleasure and satisfaction to my association with them in connection with the affairs of the Society. Our relations have always been of the most harmonious nature."

The President moved the following resolution:—

1. The Council of the New Zealand Law Society has received with great regret the resignation of the Honourable C. P. Skerrett (consequent upon his appointment as Chief Justice of New Zealand) of the position of President of the New Zealand Law Society, which he has filled for the last eight years.

2. In accepting the resignation, it desires to place on record its appreciation of the great services which Mr Skerrett rendered to the Society and to the profession generally during his tenure of office, and of the close attention which he gave at all times to the business of the Society and to all matters affecting the interests of members of the legal profession that came before the Council.

3. The Council gratefully acknowledges the ability with which Mr. Skerrett conducted the Society's affairs, and the unvarying courtesy and sympathy displayed by him in his relations with the Council as a whole and its individual members, and in his correspondence as the head and official representative of the Society with the various District Law Societies and with Ministers of the Crown and others.

4. While regretting the loss of Mr. Skerrett's services to the Society, and the severance of the happy relations which always subsisted between him and the Council when he was associated with it, the Council cordially congratulates him upon his advancement to the dignity of the Supreme Court Bench and his appointment of the high and responsible office of Chief Justice of New Zealand, and tenders him its sincere good wishes for a useful and agreeable tenure of that office.

5. That the President be instructed to forward a copy of this resolution to His Honour.

Sir John Findlay seconded the motion, and, in the course of his remarks, referred in terms of admiration to the distinguished services rendered by Mr. Skerrett to the Society during his term of office as President. He further expressed the opinion that the Dominion as a whole is to be congratulated upon his appointment to the high and honourable position of Chief Justice. The President endorsed Sir John Findlay's remarks.

The motion was put to the meeting and carried with acclamation.

OBITUARY.

JAMES CROSBY MARTIN.

We announce the death of Mr. James Crosby Martin, at the age of 70. His death took place at a private hospital at Whangarei. Mr. Martin received his early education in England. On arriving in the Colony he attended the Rev. C. Turrell's School at Riccarton, Christchurch, and at Christ College. After leaving College he decided to enter the legal profession, and served his articles in Messrs. Hanmer and Harper's office. On the 14th April, 1881, he was admitted as a Barrister and Solicitor, and six months later he joined the well-known firm of Duncan and Cotterill, under the style of Duncan, Cotterill and Martin. Mr. T. S. Duncan, the senior partner of the firm, at that time held the offices of Crown Prosecutor and Revising Barrister, Examiner in Criminal Law and Crown Solicitor, and on his death in December, 1883, these duties devolved upon Mr. Martin. While resident in Christchurch he took great interest in boating and volunteering, and was the moving spirit in starting the Christchurch Boating Club, of which he was the first President. His connexion with the volunteering movement began by his joining the College Rifle Cadets and E Battery. He held the rank of Captain in the Battery for eight years. In April, 1893, he retired from the firm of Duncan, Cotterill and Martin, and was appointed a Stipendiary Magistrate in Wellington. Subsequently to that he was appointed Public Trustee, and the 12th April, 1900, he was elevated to the Supreme Court Bench. He resigned from that position on the 2nd January, 1901, and after spending some time in Australia he joined Mr. Devore in practice in Auckland. While practising in Auckland he played a prominent part in the profession, and was much in demand as Counsel. He retired after a number of years to Russell, where he has since lived in retirement. During the years of his retirement he took a great interest in deep-sea fishing and fostered what has now become an important sport in New Zealand.

On one occasion, and that quite recently, he came from his retirement and led on behalf of the Crown in the prosecution of one Gunn, an Auckland murderer.

Mr. Martin's death will come as a great sorrow to his numerous friends and to the profession.

COURT SITTINGS.

COURT OF ARBITRATION.

NAPIER.
June 22nd.
GISBORNE.
June 24th.

He was a burglar stout and strong,
Who held, "It surely can't be wrong,
To open trunks and rifle shelves,
For God helps those who help themselves."

But when before the Court he came,
And boldly rose to plead the same,
The judge replied: "That's very true;
You've helped yourself—now God help you!"

(Old Scotch epigram)

In a recent Civil Service examination for men to join the Los Angeles police force, the following are some of the actual answers given to the questions asked:

What would you do in a case of race riot?
A. Get the number of both cars.
What is sabotage?
A. Breaking the laws of the Sabbath.
What are rabies, and what would you do for them?
A. Rabies are Jewish Priests, and I would not do anything for them.—Exchange.