[TUESDAY, MARCH 1, 1927.

Butterworth's Fortnightly Notes

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Butterworth's Fortnightly Notes.

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

—Richard Hooker

TUESDAY, MARCH 1, 1927.

THE PRIVY COUNCIL.

The imposition of a compulsory retiring age in respect to Members of the Privy Council has been mentioned by Mr. Myers K.C., as one of the changes likely to take place before long. When it is recollected that some of their Lordships have reached such advanced ages as 77 to 83 the suggested change seems timely. Doubtless the suggestion will find favour with a neighbouring member of the British Commonwealth of Nations, when its Attorney-General reports that he journeyed half the world away to pour forth his eloquence and erudition into the wide-open mouth of a sleeping Law Lord meanwhile two of his colleagues contributed a somnolent alto and base respectively.

Sir Edward Clarke, speaking in 1908, said: "I sincerely hope that before the Government reaches its "end it will have effected a work dangerously long "delayed already—the creation of a Supreme Court "for the Empire which shall not only be strong by the "strength of its personal constitution, but by the dignity "of its ceremonial, and even by the splendour of its "surroundings shall command the respect and affect "the imagination of our brethren in the British Colonies "beyond the seas."

None will grudge the Law Lords their full measure of respect for their fitness and for the great careers behind them. But as a step toward the consummation of Sir Edward Clarke's hope, the imposition of a compulsory retiring age would be an innovation welcome and appropriate.

WRIGHT V. GLADSTONE.

Had obedience to the rules of evidence been insisted upon at the hearing of **Wright v. Gladstone,** the plaintiff in this most remarkable case would have been saved from himself. He was, however, given all the rope he asked for and so the more completely hanged himself.

His testimony was amazing in that it was based upon no foundation at all. "What somebody said to a lad at Harrow"; the hypothetical similarity of a cartoon to that of the late Mr. W. E. Gladstone; the conversation of a jockey about a man whom he never saw but who had accosted a lady friend at a race meeting. These were found to be the basis of a charge against a man who was the dominating figure in English Politics during the last century. The wretched plaintiff in the case doesn't matter, but the name of the dead statesman does. Does the memory of Mr. Gladstone deserve nothing better than to be maligned twenty-seven years after his death? Had there been the least foundation for the malignant slanders, surely they would have been brought forward by the opposing political party, which although claiming for itself to be the gentlemanly party, did not exercise any restraint in its exultations over the fall of Dilke and Parnell. But great men are likely to have their memories sullied by the class to which Wright belongs. Perhaps the classic case of all is that of Abraham Lincoln who broke down a witness in a murder case and revealed him to be the real perpetrator of the deed, administering the *coup de grace* by asking how the witness saw the direction of the pistol when the shot was fired at night in the wood. The witness answered that he saw it by moonlight. Lincoln produced then a calendar which proved that the moon could not have risen at the time. Years after Lincoln's death the rumour got abroad that he had armed himself with a calendar not of the current year, the implication being that to win a case Lincoln sent an innocent man to his doom.

Gladstone's character is said now to be vindicated. This however is claiming too much. Gladstone's character was not the issue. The issue was whether Wright was a liar. He is so contemptible that whether he is, or was, or not, ceases to be of interest. What the case proved was that he had no grounds at all for his aspersions of the great statesman whose character is too well attested to be now called into question.

REPORTING MOTOR CAR ACCIDENTS.

In the Magistrate's Court at Palmerston North, last week, it was contended by the Police that the provisions of Section 31 (2) of the Motor Vehicles Act 1924 are well-known, because whenever a person was injured the police were generally made acquainted of the fact. Opposing counsel however maintained that the obligation upon the driver to report the accident to the police is not well-known and this contention is the more probable of the two. The subsection, which reads as follows: "In any such accident involving injury to "any person, it shall be the duty of the driver of the "motor vehicle to render all practical assistance, and, "if the accident has not already been reported to a "constable, the driver shall forthwith report the same "at the nearest police-station."

The penalty for non-compliance is £20. In view of this provision laying a duty upon a large section of the community such as the motoring community now is, steps should be taken to definitely acquaint those upon whom this duty devolves concerning their further obligations. As all motorists are registered, the manner of advising should not be difficult to devise.

VICARIOUS LIABILITY.

The incidence of vicarious liability raises many problems, in morality as well as in law; and two recent cases point a striking contrast. In **Thompson v. Hamilton,** 1927, N.Z.L.R. 11, it was held that the delegate of a servant did not make the master civilly liable if the servant was absent when the damage took place; to use the words of an old case, the damage was done on a frolic of the servant's. On the other hand a delegate five times removed made the master liable for breaches of the Licensing Act (**Police v. Bain,** 1927, Mag. Crt. Rep. 1). Perhaps some students' debating society will be moved to discuss whether the delegates five times removed left in charge of an hotel can make the licensee civilly liable for supplying poisonous beer,

SUPREME COURT.

Reed J.

November 11, December 1, 1926.
Palmerston North.

ASTON v. JUST.

Will—Interpretation—Gift of land, buildings and furniture and effects of every kind—Contents of safe—Money and choses in action—Which passes to donee—Residuary gift—Whether gift personal or to a class—Chapman v. Hart, 1 Ves. Senr., 271, 272; In re Looney, 1924 N.Z.L.R. 478, followed.

Two questions were submitted to the Court for determination:—

1. Did the gift "to my said son Arthur Wilhelm Just of a certain section of land together with all buildings thereon erected and all my furniture and effects of every kind that belong to me thereon and therein at the date of my decease absolutely" entitle the donee (a) to the contents of a safe in the dwellinghouse which contained **inter alia** (1) silver and gold coins and bank notes to the value of £181, (2) an unendorsed fixed deposit slip from the Bank of New South Wales, £300 deposited by the testator; (b) the contents of the testator's pockets, including (1) £1 12s. in cash, (2) the proceeds of an overdue promissory note for £29 15s. endorsed by the testator, and the sum since paid to the executors; (c) two spray pumps, one tricycle, and one Ford truck kept on the said land and there at time of testator's death?

2. One of the testator's children, Maxwell Bernard Just, predeceased testator, leaving issue. Do the issue take a benefit under a residuary gift "unto my children exclusive "of my said son Arthur Wilhelm Just and my son Bruno "Hugo Just, in equal shares and proportions"?

Grant for plaintiff.
Innis for defendant.

REED, J.: It may be observed, first, that there is a residuary bequest in the will and that there is property upon which it can operate even if all that is claimed for the defendant is conceded. The net value of the estate is £4873 15s. 6d., and consists, in addition to the property so claimed, of mortgages £1115 5s. 8d., cash on fixed deposit £879 8s. 2d., cash in solicitor's trust account £71 0s. 6d., and £19 in book debts, or appproximately, after deducting liabilities, a total of £2029. At the date of the execution of the will the testator's family consisted of seven children, all of full age. Before his death one child died leaving a widow and six children. It is clear that the testator intended to prefer the defendant to his other children, but no inference can be drawn from that fact; if his present contention fails the defendant will still receive nearly half the estate.

The fact that there is a residuary bequest, which would operate in respect of the matters in question if the clause were held not to do so, is an argument "of no inconsiderable "weight," says Mr. Jarman, in favour of a restricted construction being put upon general words such as are used in this will. Nevertheless, I do not think that the words "everything that will belong to me thereon and therein" must be construed as restricting the gift to articles ejusdem generis with "furniture and effects of every kind." I think, therefore, that there passed under this general clause (1) the silver and gold coins and bank notes to the value of £181 which were in the safe. If there had been any evidence that this was an unusually large sum of money for the testator to keep in his safe, the position might have been different, as tending to show that its presence was accidental and could not have been intended to pass under general words but would have been specifically mentioned. "Any "ready money in the house if not an extraordinary sum and just received would pass," per Hardwicke L.C. in **Chapman v. Hart**, 1 Ves. Senr., 271, 272. There was, however, no evidence on the point. (2) The cash £1 12s. found in the pockets of the testator in the house also passes under the general words. (3) The two spray pumps, the tricycle, and the Ford truck, being on the property at the death of the testator, are also covered by the general words.

This leaves for consideration the bank deposit slip for £300 and the promissory note for £29 15s. I think that there can be no doubt that the benefit of these does not pass. They are only evidence of money elsewhere and are in effect choses in action. The doctrine has been long established that choses in action have no locality. There is nothing in the language of the testator in this will to raise any inference that he intended that the benefit of those choses in action should vest in the defendant.

In respect to the second question, His Honour continued: I think the present case is indistinguishable from **In re Looney**, 1924 N.Z.L.R. 478. I there examined the cases, the result of the authorities being as stated by Lord Davey in **Kingsbury v. Walter**, 1901 A.C. 187: "it may be none the "less a class because some of the individuals of the class "are named." If in the present case the gift were "to my "children" simpliciter, it is unquestionable that would be to a class, the mention, either by way of exclusion or inclusion, of individual members of that class does not alter the construction. I think, therefore, that the children of the deceased son do not take their parent's share.

The questions asked will be answered in accordance with this judgment.

Costs of all parties to be taxed by the Registrar and paid out of the estate.

Solicitors for plaintiff: **Jacobs & Grant**, Palmerston North.

Solicitors for defendant: **Innes & Oakley**, Palmerston North.

Adams J.

December 7, 9, 1926.
Auckland.

WHITE v. JURY.

Purchase and Sale of Fish Business—Restrictive Covenant not to be concerned "in any such business"—Vendor being partner in Street Stall—Whether breach of Covenant—Injunction—Damages.

In March, 1926, defendant sold to plaintiff the goodwill of a fish shop and restaurant at Tauranga, covenanting for a period of five years not to start in opposition to the purchaser "as a "fish shop keeper or restaurant keeper," or be interested in any such business, in opposition to the purchaser, in Tauranga. The defendant was for two or three months interested in the sale of fish carried on by one Blick, the defendant and another in the street close to the plaintiff's shop. Defendant was a partner in the stall business and contended that proviso was to be construed as confined to the sale of fish in a shop.

Plaintiff sought an injunction and damages.

West for plaintiff.
Northcroft for defendant.

ADAMS J. The contention of the defendant is that the phrase "any such business" in the proviso is to be construed as confined to the sale of fish in a shop, and that a stall in the street is not a shop. It is to be observed however that the contract is for the sale of the goodwill of the business of the fish shop and of the stock and chattels used in connection with "the "said business." The business of the fish shop was that of selling fish by retail and the phrase "any such business" means any business for the sale of fish. The business carried on at the stall was the selling of fish and the being interested in that business is therefore within the very words of the proviso.

The plaintiff asks for an injunction and damages. He is entitled to the injunction in terms of the prayer in his Statement of Claim. I assess the damages at £25. The defendant must also pay the plaintiff's costs on the lowest scale.

Solicitors for plaintiff: **Jackson, Russell, Tonks & West**, Auckland.

Solicitors for defendant: **Earl, Kent, Massey & Northcroft**, Auckland.

Skerrett C.J. December 4, 23, 1926.
New Plymouth.

IN RE HARRISON, A BANKRUPT: EX PARTE BENNETT AND SUTTON.

Bankruptcy—Mortgagees in possession—Sale of stock by auction—Dairy Company notified of position—Shares—No certificate issued—Transfer signed by Bankrupt—Order and Disposition.

Bankrupt carried on a dairy farm in the Patea district, and was financed by the Pease Trustees. On 12th February, 1923, bankrupt executed a mortgage over the farm of 53 acres and a collateral chattel security over the live stock, plant, and 85 shares in the Hawera Co-operative Dairy Co., Ltd., to secure repayment to the Trustees of £6,000 and all future advances. Both documents were registered. Bankrupt supplied milk to the Co-operative Company and to retailers. In order to qualify as a supplier to the Co-operative Company bankrupt had to take up 85 shares therein. No certificate was issued for the shares in accordance with the practice of the Company.

In October, 1925, the Pease Trustees entered into possession of the farm under the mortgage and called up the monies owing under the chattel security. The live stock and plant were offered for sale at a public auction, when they were purchased by the Pease Trustees. The sale was well attended. Immediately after the sale the Trustees appointed in writing the bankrupt to be their salaried servant, to occupy and work the farm and to supervise the farming of other properties under mortgage to them. Since the sale of the live stock and plant bankrupt had not obtained credit nor incurred debts in his own name in connection with the farm. The Co-operative Company were informed of the change by bankrupt advising the secretary. He also signed a transfer of his shares to the Pease Trustees and handed the transfer to one of the Trustees for completion. It was never completed.

Bankrupt was adjudged bankrupt on 13th April, 1926. It is claimed that the live stock, plant and shares passed to the Deputy Official Assignee in Bankruptcy as being in the possession, order and disposition of the bankrupt by the consent and permission of the true owner, under such circumstances that the bankrupt is the reputed owner thereof.

Taylor for Official Assignee.
Beechey for Pease Trustees.

SKERRETT C.J.: It is claimed that the 85 shares in the Hawera Co-operative Dairy Company, Ltd., passed to the Deputy Official Assignee under Sub-section (c) of Section (6[1]) of The Bankruptcy Act, as being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt by the consent and permission of the true owner, under such circumstances that the bankrupt is the reputed owner thereof. It is clear that in New Zealand shares in a company registered under the Companies Act can be in the possession, order or disposition of the bankrupt within the clause under consideration. This arises because our Bankruptcy Act does not contain the proviso to Section 38 of The Imperial Bankruptcy Act 1914, excluding things in action from the expression "goods" used in the section. It is, however, clear that in order that the shares should be in the possession, order or disposition of the bankrupt the bankrupt must have been in a position to make an effectual sale of the shares in question, or to obtain credit upon them from any prudent customer. **(Colonial Bank v. Whinney, 11 A.C. 441.)**

It is necessary, therefore, to apply this principle in the present case. It is true that no certificates for the shares held by the bankrupt in the company had ever been issued, and that it was not the practice of the company to issue share certificates. So far, therefore, the absence of the share certificates did not prevent the bankrupt from possessing the right of disposal of these shares; but there are other circumstances arising from the very nature and character of the company which prevented this right of disposal in the bankrupt arising. These shares were required to be held by all "bona fide members" of the company as defined in the Articles of Association, meaning in substance the supplying shareholders of the company.

After citing the provisions of the Articles of Association, His Honour continued: It appears clear, therefore, that the bankrupt, while these shares were held in his name, had not the power of disposal of the shares. The shares could only be transferred to a person who intended to immediately become a bona fide member of the company—that is, a supplying shareholder of the company. The transferee would have to obtain the consent of the directors of the company, who could in their absolute discretion, and without giving any reason, decline to register the transfer. A person could not accept a transfer of these shares without contemplating the supply of milk or cream to the company and without making arrangements with the company for such supply. It would be necessary, therefore, for a proposed transferee to interview the company, and upon such an interview he would at once be informed that the shares were to be transferred to the Pease Trustees, who were supplying the milk or cream to the company in respect of which supply the shares were allotted. It is notorious amongst farmers and others in dairying districts that the shares allotted to a milk supplier by a company are so allotted in connection with the supply of milk or cream to the company, and are held in a fixed proportion to the quantity of milk or cream for the time being supplied. The shares are regarded as an adjunct to the shareholder's milk supply to the company or to the herd of the shareholder. No person could take a transfer of the shares unless he had acquired the transferor's dairy farm and herd, or unless he possessed a farm or herd of his own. It is equally clear that the bankrupt was not able to obtain credit upon such shares, because they are valueless unless they are held by a milk supplier to the company or by a person who intended to immediately become a milk supplier to the company on the basis of such shares.

I am of opinion, therefore, that the 85 shares were not within the order and position of the bankrupt, and must refuse to make the order asked.

It is clear that the instrument under the Chattels Transfer Act created an equitable mortgage or charge over the 85 shares included in its schedule, and that the Official Assignee's title is subject to such equitable interest.

With regard to the live stock and plant, it is in my opinion clear that they were not in the possession, order or disposition of the bankrupt at the time of his bankruptcy with the consent of the Pease Trustees; and further, that they were not in the possession of the bankrupt under such circumstances that he was the reputed owner thereof.

The case is not within the category of such cases as **Lingard v. Messister** (1 B. & C. 308; 107 E.R. 116-117) and **Ex parte Lovering** (L.R. 9 Ch. 621).

The result, therefore, is that the motion will be dismissed with costs twenty guineas and disbursements to be paid by the Deputy Official Asisgnee to the Pease Trustees.

Solicitor for Deputy Official Assignee: **L. A. Taylor**, Hawera.
Solicitors for Pease Trustees: **Welsh, McCarthy, Beechey & Houston**, Hawera.

Adams J. November 30; December 13, 1926.
Auckland.

WHEELER v. SMITH.

Motor bus service—Carrying on service within two districts—Application to licensing authority of one district to ply for hire in both districts—Held application for license must be to each authority for each district operated in.

Appeal on law from a determination of R. W. McKean, Esq., Stipendiary Magistrate at Auckand, dismissing an information charging that the respondent did on 2nd November, 1926, carry on within the Motor-Omnibus District of Takapuna a motor-omnibus service otherwise than pursuant to the authority of a license granted by the licensing authority appointed under the Motor-Omnibus Traffic Act 1926.

Respondent operated a motor-bus service between Devonport and Milford, which is within No. 1 Motor-Omnibus District. Part of the route is within the Borough of Takapuna, which constitutes No. 2 Motor-Omnibus District. Re-

spondent had applied to the Local Authority of No. 1 District for a license under Section 5 of the Motor-Omnibus Traffic Act 1926, to continue his service through both districts. Respondent's application was in order, and it was conceded that the license would have been granted but for the suggestion that the licensing authority of No. 1 District has no jurisdiction to grant a license authorising respondent to carry on a motor-bus service within District No. 2.

Finlay & Lowry for the appellant.
Northcroft & Gould for the respondent.

ADAMS J.: I think that the Magistrate has not given sufficient consideration to the provisions of Section 4, Subsections (1), (2). The word "every" in Sub-section (1) is to be construed distributively. It has the sense of "each," and the sub-section is to be read as referring to each district **singula singulis.** The expression "the licensing authority" in Sub-section (2) plainly means the licensing authority appointed under Sub-section (1) for that district. There is thus constituted a separate licensing authority for each district, with exclusive jurisdiction within that district. That is conceded by counsel for both parties to this appeal. When we come to Section 5 we find that it is a general section prohibiting any person from carrying on within a motor-omnibus district any motor-omnibus service "otherwise than pursuant to the authority and in conformity "with the terms of a license granted by a licensing authority under this Act." The section does not confer jurisdiction to grant licenses, but prohibits the carrying on of a service by any person within any district without a license, and enforces that prohibition by severe penalties.

It is true that there is no section in the Act which says in express words that the licensing authority for each district may grant licenses, but this authority is necessarily implied in the sections I have quoted and in Sections 6, 7, 10 (1), and 15 (7), and is also implicit in Section 16. The alternative would be that the Legislature must be held to have made the act of carrying on a service without a license unlawful without providing any means by which a license could be obtained; the prohibition which is obviously intended to be conditional would in effect be absolute.

Regulation number 3, "Gazette," 23rd October, 1926, p. 300, requires that application for authority to establish or continue a motor-omnibus service within any motor-omnibus district shall be made to the licensing authority of that district. It is submitted that this regulation is **ultra vires** and invalid, and the Magistrate appears to have been of that opinion. I see no reason to doubt its validity. Clause (k) of Section 18 confers authority to make regulations prescribing all such other matters as may be necessary or expedient for the purpose of giving full effect to the Act. This is not limited to matters **ejusdem generis** with those mentioned in paragraphs (a) to (j). It confers a quasi-legislative power to make all such provisions as may be found necessary to give full effect to the Act. I do not think it necessary to refer to any of the authorities cited on the application of the rule of construction **ejusdem generis.** It is fully discussed in **Tillmans & Coy. v. S. S. Nutsford, Ltd.,** (1908) 2 K.B. 385. The Magistrate thought that any extension of the provisions of the Act by regulation would be invalid. That doctrine would confine the power to mere repetition of the Act, and so reduce it to a nullity. It is sufficient that the regulations be not unreasonable, nor in excess of the statutory power authorising them, nor repugnant to the Act or to the general principles of law: **Maxwell on Statutes, 6th Edn., p. 522.** Where there is a competent authority to which an Act of Parliament entrusts the power of making regulations, it is for that authority to decide what regulations are necessary; and any regulations which that authority may decide to make should be supported unless they are manifestly unreasonable or unfair—**London County Council v. Bermondsey Bioscope Coy.,** 1911, 80 L.J. K.B. 141, per Lord Alverstone C.J., 144.

It is contended, however, that in any case where the route of a motor-omnibus service is within two separate districts the licensing authority of either district may grant a license for the whole service. That appears to be in effect a proposition that any licensing authority may grant a license authorising a person to carry on a motor-omnibus service within any other motor-omnibus district in the Dominion. The consequences of this would be startling. Applicants for licenses could choose their own tribunal, and there would be nothing to prevent the present or any application being made to, and granted by, say, the Invercargill Borough Council, which is the licensing authority for district number 13.

Incidentally that Council would determine, under Section 6, all questions relating to facilities for transport within the areas to be served, the condition of the roads or streets to be traversed, the normal traffic thereon, and all other relevant considerations; would give the notices required by Section 7, prescribe the routes to be traversed, time-tables, and the fares; the conditions to be imposed, including such conditions as it thought proper under Section 10 (1); determine the number of sections and the fares for each, and where there is an existing tramway or motor-omnibus service carried on by a local or public authority would, under Section 10 (2), fix the minimum fare to be charged. It would also have the custody of the insurance policy required by Section 13.

Moreover, if any party interested desired to appeal, the appeal would be decided by the Appeal Board of district number 13. To attribute to the Legislature an intention to bring about such results would be absurd. I have taken an extreme case by way of illustration; Counsel for the respondent, however, accepted it as a logical conclusion from his argument; and the absurdity is not lessened when, as in this case, it is proposed that the Council of the City of Auckland should impose its will upon the Council and burgesses of Takapuna.

In my opinion, therefore, the licensing authority of Number 1 District has no jurisdiction to grant the license for which the respondent has applied.

I am therefore of opinion that the respondent should have been convicted of the offence charged. The appeal is allowed and the case is remitted to the Magistrate to record a conviction accordingly.

The respondent must pay the costs, which I fix at £15 15s. and disbursements.

Solicitor for appellant: **G. P. Finlay,** Auckland.

Reed J. November 15, December 22, 1926.
Palmerston North.

NASH & RAPLEY v. O'DONNELL.

Specific Performance—Solicitor approving Memorandum of Transfer—Whether sufficient memorandum in writing—Statute of Frauds—Whether solicitor agent thereunto lawfully authorised.

Defendant verbally instructed a land agent to sell a piece of land at Palmerston North. A sale was eventually arranged with plaintiffs at £375. Subsequently a dispute arose concerning the erection of a fence. The defendant declined to sign an agreement for Sale and Purchase, but intimated that Mr. J. B. Wither was his solicitor, and if the purchase price was paid to Mr. Wither the defendant would immediately sign the transfer. Plaintiffs thereupon deposited a cheque value £375 with Mr. Wither, at the same time submitting a Memorandum of Transfer for execution by the defendant. Mr. Wither treated this document as a draft, altered it, and returned it. The alteration was the insertion of a fencing covenant. The letter, dated 23rd July, 1926, read:—

"Herewith I enclose this transfer approved on behalf of "the vendor as altered in purple type and shall be obliged "if you will kindly let me have the engrossment duly exe-"cuted by the transferees for execution by the vendor. I "have endorsed plan thereon."

Upon the engrossed memorandum being submitted to the defendant he refused to sign it until the plaintiffs agreed to erect a boundary fence to defendant's specifications, which plaintiffs declined to do.

Action for specific performance. The defence was that there was no concluded contract between the parties, nor was there any memorandum or note in writing of the alleged agreement as required by the Statute of Frauds or at all.

Cooper for plaintiff.
Ongley for defendant.

REED J., after citing the following cases: Smith v. Webster, L.R. 3 Ch.D. 49; Daniels v. Trefusis, (1914) 1 Ch. 788, 798; Jones v. Victoria Graving Dock Co., L.R. 2 Q.B.D., 314; John Griffiths Cycle Corporation, Ltd., v. Hunter & Co., Ltd., 1899, 2 Q.B. (414) (reversed in the House of Lords on different grounds); North v. Loomes, (1919), L.R. 1 Ch. 378; Thirkell v. Cambi, (1919) 2 K.B., 590; Griddell v. Bass, 1920, 2 Ch. 487; Cloncurry v. Laffin, (1924) L.R. Ir. Ch. D. 78, proceeded: The law, therefore, would appear to be settled that it is not necessary that the agent should have authority to bind his principal by a contract; it is sufficient if he has authority to sign the particular memorandum relied on. The only question, therefore, is whether Mr. Wither had authority to write the letter of the 23rd July approving of the transfer. Some guidance is to be derived from some of the above cases coming to a conclusion upon this question.

In Daniels v. Trefusis it was argued that, although the solicitors might have had authority to forward the statements, they had no authority to sign the letters enclosing the statements, since they might have been sent without any accompanying letter or signature. Sargent J. said:

"I do not think that this argument is sound in a case "like the present, where the normal and usual method of "communicating the two statements was adopted, namely, "by means of the post and by enclosing them in letters re-"ferring to or indicating the enclosures."

So in the present case the normal and usual practice in returning an approved draft is to send a covering letter indicating the enclosure.

Applying the principle of these authorities to the present case, there can be no doubt that, when the defendant authorised his solicitor to receive the purchase money and to complete the transaction, he authorised him to sign the letter accompanying the approved transfer. Mr. Wither, therefore, being so authorised, is an agent "thereunto lawfully authorised" within the meaning of the statute. The letter accompanied by the approved transfer, containing as they do all the necessary terms, constitute a proper memorandum within the statute.

There will be a decree for specific performance of the contract embodied and set out in the transfer as approved by the solicitor for the defendant, with costs on the middle scale as on a judgment for £375 with disbursements and witnesses' expenses to be ascertained by the Registrar.

Solicitors for the plaintiffs: **Cooper, Rapley & Rutherford**, Palmerston North.

Solicitors for the defendant: **Gifford Moore, Ongley & Tremaine**, Palmerston North.

Stringer J. December 23, 1926; January 10, 1927.

IN RE WIGLEY SETTLEMENT AND IN RE TURRELL SETTLEMENT: NEW ZEALAND INSURANCE CO., LTD., v. CHARLOTTE E. WIGLEY & OTHERS.

Marriage Settlement—Trustee and life tenant—Power of appointment—Family settlement—Whether power of appointment is coupled with a trust or duty preventing extinguishing of power of appointment—In re Radcliffe, L.R. (1892) 1 Ch. 227 followed—In re Eyre 49 L.T. 259 distinguished.

By marriage settlement William C. H. Wigley conveyed certain property to Trustees upon trust to pay the income therefrom to the Settlor during life and after his death to his wife, Charlotte Elizabeth Wigley, until her death or second marriage, and subject thereto to stand possessed of the trust funds and income thereof in trust for such children of the marriage as the settlor should by deed or will appoint, and in default for all the children equally.

By the other settlement the Rev. Charles Turrell, father of Charlotte Elizabeth Wigley, transferred a life insurance policy for £1000 upon his life to trustees upon trust to pay the income from the policy monies to Charlotte E. Wigley for life and after her death for such children or remoter issue of the marriage as the said Charlotte E. Wigley and William C. H. Wigley should by deed jointly appoint, and in default for all the children equally.

The life interest of W. C. H. Wigley under the Wigley Settlement has been extinguished by bankruptcy. After being divorced by his wife, the power of appointment in respect to the Wigley Settlement was by order of the Supreme Court vested in the manager for the time being of the Trustee Branch of the Plaintiff company in lieu of C. H. Wigley, his power of appointment and all other rights under the Turrell Settlement being also extinguished. The plaintiff company now is the trustee of both settlements. There are now three children of the marriage, one being a minor.

To effectuate a family settlement, the Court is asked:

1. Whether the power of appointment vested in the Plaintiff under the Wigley Settlement is coupled with a trust or duty which prevents the Plaintiff from extinguishing such power of appointment, or whether the Plaintiff may lawfully and properly extinguish such power of appointment along with the surrender by the life tenant of her life estate under the said settlement.

2. Whether, if such power of appointment is so extinguished, and such life tenancy is surrendered, the settled funds:

(a) As to two out of three equal parts thereof will at once vest in and become payable to the two adult beneficiaries in equal shares.

(b) As to the remaining one equal third part will continue to be held by the Plaintiff (as trustee) for the minor beneficiary conditional on his attaining the age of 21 years.

3. Whether in respect of the settlement by the Reverend Charles Turrell the life tenant and the person in whom the power of appointment is vested, namely, the said Charlotte Elizabeth Wigley, may lawfully and properly extinguish her power of appointment and surrender her life estate.

4. Whether, if that may be done, the result will be as set out in clause 2 hereof, but with respect to the settled funds under the settlement by the Reverend Charles Turrell.

Richmond for plaintiff.
Goulding for guardian ad litem.
Lucas for other defendants.

STRINGER J.: With regard to the question arising out of the Turrel Settlement, the matter seems quite free from doubt. Under Section 25 of the Property Law Act 1908, the person to whom any power is given may release or surrender such power, and the validity of the release of the power is not affected by reason of the fact that such release enures for the benefit of the person releasing. That is clearly established in the case of **In re Radcliffe**, L.R. (1892) 1 Ch. 227.

The effect of the release of the power of appointment is that no appointment can thereafter be made and consequently the trust funds go as provided in the settlement as in default of appointment. Mrs. Turrell, of course, can surrender her life interest in order to enable the proposed arrangements to be carried into effect.

With regard to the Wigley Settlement, I think that the case of **In re Radcliffe** is also applicable. The question asked with reference to this settlement is designed to raise the point as to whether or not the power of appointment thereunder is coupled with a trust or duty so as to bring it within the case, to which I was referred, of **In re Eyre**, 49 L.T. 259, in which it was held that a power coupled with a duty could not be released. In my opinion, however, that case is clearly distinguishable from the one under consideration. There a Testator by his will had bequeathed a portion of his estate to trustees upon trust "for such persons in "such shares and generally in such manner" as the trustees should in their absolute discretion direct, limit and appoint, and in default of such appointment in trust for all the Testator's childen equally. One of the trustees purported to release his power of appointment with the object of rendering a joint exercise of the power thereafter impossible, and thus to give effect to the bequest, in default of appointment, viz., to all the children of the Testator. It was held, however, that the power of appointment could not be destroyed in this way, inasmuch as no trustee could by his voluntary act destroy a trust which had been committed to him.

In my opinion this decision is only applicable when a trust or duty is imposed upon the donee of the power by the instrument by which the power is conferred, which was not the case in the settlement under consideration.

I think that the questions arising under both settlements are governed by the case of **In re Radcliffe**. That being so, it follows that if the powers are released, and the life in-

terests are surrendered, two out of the three equal parts of the settled funds will at once vest in and become payable to the children of the marriage who have attained the age of 21 years, and that the remaining third share will be held by the company upon the trusts set out in question 2 (b). Interest on this share will, in the meantime, be applicable for the maintenance and education of the minor, and, so far as unexpended, will go in augmentation of such share.

The questions submitted are therefore answered in conformity with the terms of this judgment, and an order may be drawn up accordingly. Costs of all parties to be taxed by the Registrar and to be paid out of the settled funds.

Solicitors for plaintiff: **Buddle, Richmond & Buddle.**
Solicitors for guardian ad litem: **Goulding & Rennie.**
Solicitor for Mrs. Wigley and daughters: **T. A. Lucas.**

Herdman J. November 17, 1926; February 2, 1927. Auckland.

McLELLAN v. NEW ZEALAND ROADS, LTD.

Negligence—Sub-contractor leaving rails in road unlighted—Whether principal contractor liable.

The Plaintiff in this action claimed the sum of £410 for injuries sustained by her, she having fallen at night over a heap of iron rails which had been deposited and left on a street in the town of Turua. The heap of rails was unlighted, and nothing had been done to protect the public against falling over it. The rails had been deposited there by sub-contractors of the defendant company, the defendant company being engaged in road formation and the rails were required in pursuance of that purpose.

The action was tried before a special jury of 12, and the sum of £310 was awarded to Plaintiff as damages.

Defendant counsel, however, submitted that, notwithstanding the verdict of the jury, the Defendant Company was not liable, inasmuch as the failure of Biddle and Clark, the sub-contractors who had taken delivery of the rails, to guard them or light them was casual or collateral negligence for which in law Defendants are not responsible.

Inder for plaintiff.
McVeagh for defendant.

HERDMAN J.: The general rule is that an employer is not liable for the negligence of an independent contractor or his servants. But to this rule there are certain well-known exceptions, which are conveniently stated in **Clark v. Lindsell's work on Torts, 7th Edition, page 110**, in the following extract:—

"4. Where a person (including a corporation) employs a "contractor to do work in a place where the public are in "the habit of passing, which work will, unless precautions "are taken, cause danger to the public."

There can be no doubt that Defendant Company employed Biddle and Clark to do work in a place where the public were in the habit of passing, and that the work was dangerous unless safeguards were provided.

The Plaintiff submits that the negligence of which Messrs. Biddle and Clark were guilty is within the last exception *and that the Defendant Company is therefore liable.*

It is argued on the other hand that the Company is relieved from the liability under a rule which is recorded in **Halsbury, volume 21, page 473**, in the following passage:—

"A principal is not liable for damage resulting from the "casual or collateral negligence of an independent con-"tractor, or of the latter's servants, while doing the work "contracted to be done."

On page **473, volume 21, of Halsbury's Laws of England** there is a note which states that "negligence is said to be "casual or collateral when it arises incidentally in the "course of the performance of and not directly from the act "authorised," and then instances are given, such as a workman leaving a tool or barrow in a road.

But in the present case the kind of negligence complained of by the Plaintiff is not in my opinion negligence which arose incidentally in the course of the performance of the contract. This is not the case of a workman casually leaving a barrow or a tool on the highway or dropping a stone from a bridge or building. It is not the case of danger which could not have been contemplated. On the contrary it was a danger which should have been calculated upon.

There can be no doubt that rails had to be supplied from time to time by Defendant for the purpose of forming a tramway, and the rails were supplied and deposited at places where they were required. But just as it was of the very nature of the contract that metal should be unloaded and carried along by means of the tramway to be deposited on the highway, so it seems to me it was inevitable that in the performance of the contract rails would be left after delivery, perhaps for a long time, perhaps for a short time, in a heap on or near the road until the moment they were required.

In the performance of the contract there was no escape from this, and I therefore think that there was a duty to take necessary precautions—a duty which in such a case as *the present one extended to the employers of Messrs. Biddle* and Clark.

In principle there is little to distinguish this case from **Penny v. Wimbledon Urban Council**, 1899, 2 Q.B., page 72. Then there is the case of **Padbury v. Holliday & Greenwood (Limited) and Another**, T.L.R., Vol. 28, at page 495.

(Maxwell v. British Thomson Houston Coy., T.L.R., Vol. 18, also referred to.)

My view is that the verdict in the present case must stand, so the plaintiff will have judgment for the amount awarded with costs as per scale, witnesses' expenses and *disbursements to be settled by the Registrar.*

Solicitors for plaintiff: **Inder & Metcalfe.**
Solicitors for defendant: **Russell, Campbell, & McVeagh.**

Skerrett C.J. December 15, 1926; January 28, 1927. Wellington.

SIEVWRIGHT v. THE WELLINGTON BOWLING CLUB, LTD.

Company—Over-issue of shares—Purporting to allot—Plaintiff treated as shareholder for 17 years—Expulsion—Increase of capital—Whether purported allotment could now be enforced.

The Plaintiff, in August, 1907, was elected a member of the Wellington Bowling Club, and to qualify as a member applied for one share in the limited liability company controlling the club. The shares of the Company were already over-issued. The Company, however, purported to allot a share to the Plaintiff, and he continued to act as a shareholder for 17 years, and was treated as such by the Company. In 1924 Plaintiff was by resolution expelled from the Club and his share was declared forfeited.

Plaintiff sought and obtained an injunction restraining the Company from acting upon the resolution of expulsion and forfeiture. On appeal it was held that the Plaintiff had not become a shareholder, because at the time when the Company purported to allot a share to him it had already over-issued its capital to the extent of 334 shares, and therefore there was no share which could be allotted to him. In 1926 the Company increased its capital by 250 shares, whereupon the Plaintiff applied to have one of the shares allotted to him, which the directors have refused to do.

Plaintiff now claims that he is entitled to have such share allotted to him.

Blair & Parry for plaintiff.
Wiren for defendants.

SKERRETT, C.J.: The circumstances that the Plaintiff had acted as a shareholder of the Company for about 17 years and had been treated by the Company during that period as a shareholder cannot affect the matter. The answer to the Plaintiff's claim is that he claims under a contract which was **ultra vires** *of the Company and therefore void. It could* create no rights in his favour and impose no obligation on him. It was wholly beyond the capacity of the Company to enter into; and being wholly void, it could not be ratified or confirmed.

But it is said that when the capital of the Company was increased the Company became bound to issue a share to the Plaintiff under the agreement of 1907 and under an agreement to be implied from the long course of dealing between

them. It is not suggested that the Plaintiff is able to invoke any new or independent contract on the part of the Company after the increase of capital to issue to the Plaintiff a new share. It is clear that the Company would not have entered into any such new and independent contract with the Plaintiff, because of the friction which has arisen between the Plaintiff and the Company. The claim that upon the increase of capital the Company became bound to issue a share in the new capital to the Plaintiff is only another way of suggesting that the contract of 1907 was voidable and that by reason of the relationship of the parties during the period of 17 years the contract became binding on the Company. This argument is wholly untenable. The original contract was wholly void and incapable of confirmation. I am at a loss to imagine what branch of the doctrine of estoppel could be invoked to enable the Plaintiff to compel the Company to allot him a share. It was expressly held by the Court of Appeal in the appeal case before referred to that the Defendant Company cannot be estopped from showing that it had no power to do what it had purported to do and from alleging and setting up the illegality of its contract with the Plaintiff.

It was contended that because the Company had not before the issue of the new capital arrived at any determination under Article 31 the Plaintiff became in some way entitled to an allotment of a share in the new capital. The only effect of the absence of this determination on the part of the Company was that the new shares might be dealt with as if they formed part of the shares in the original ordinary capital. (See Article 31.) The new shares were therefore under the control of the directors, who might allot the same, subject to certain inhibitions, to such persons, on such terms and conditions as the directors should think fit. (See Article 2.) It is plain, therefore, that to entitle the Plaintiff to an allotment of a share in the new capital he mush shew an enforceable contract on the part of the Company to make such an allotment. This he has failed to do.

It is to be noted that neither in the statement of claim nor at the hearing before me did the Plaintiff claim that the contract between him and the Company was a contract on the part of the Company to increase the capital of the Company and out of such increased capital to allot the Plaintiff the one share necessary to qualify him as a member of the Company. No such contract could be set up. Even if it could, there are cogent reasons why such a contract would be ultra vires of the Company, but it is unnecessary to express any conclusion on the point.

The result, therefore, is that there must be judgment for the Defendants with costs on the lowest scale, witnesses' expenses and disbursements.

Solicitors for plaintiff: **Chapman, Tripp, Blair, Cooke & Watson,** Wellington.
Solicitor for defendants: **Wylie & Wiren,** Wellington.

Stringer J. July 16, December 21, 1926. Auckland.

IN RE A. WHYTE.

Bankruptcy—Annulment—O. A's Commission not payable—Payment of petitioning creditor's costs made condition of annulment.

Circumstances in which it was held that, on an application to annul an adjudication, Official Assignee's commission was not payable, nor would payment thereof be made a condition of securing annulment. But payment of petitioning creditor's costs made condition of annulment.

Motion for order under Section 136 (b) annulling adjudication of bankrupt.

C. C. Chalmers in support of motion.
A. M. Goulding for Official Assignee.
T. J. Fleming for petitioning creditor et al.

The facts of this matter, for the purpose of the point of law reported, are as follows:—

The property of the bankrupt passing to the Official Assignee was an equity in a valuable farm in Taranaki. There were no other assets. The Official Assignee had purported to contract by private treaty for the sale of this equity; but the attempted sale, being in contravention of Section 63 (a) of the Bankruptcy Act 1908, was, on the separate application of the bankrupt, declared by the Court to be null and void, following **Hamilton v. Bank of New Zealand,** 24 N.Z.L.R. 109, C.A. Before the Official Assignee could resell this equity by public auction or by public tender in terms of said Section 63 (a), the bankrupt's solicitor had arranged finance with which to pay in full the debts of the bankrupt, with a view to securing an annulment of the adjudication under Section 136 (b) of the Bankruptcy Act 1908. On the application for annulment the questions arose:

(1) Whether Government commission under the Act was payable to the Official Assignee.

(2) Whether the petitioning creditor's costs were also payable.

The Official Assignee claimed such commission, and the petitioning creditor claimed his costs. As to commission, counsel for the bankrupt submitted that:

(3) The "debts" of the bankrupt mentioned in said Section 136 (b) could and were ordinarily paid direct to the various creditors. Payment to the Official Assignee could only be made with the consent of the creditors, and this would mean delay: **In re Fisher,** 27 N.Z.L.R. 98. As to the meaning of "debts," **Re Keet,** (1905) 2 K.B. 666, was referred to.

(4) That Section 120 (a) (i) of the Bankruptcy Act was inapplicable, inasmuch as there were no "moneys received "by the Assignee by the realisation of the property of" the bankrupt.

(5) That the claim to commission did not fall within the provisions of Section 171 of the Act and Part III of the Schedule thereto, inasmuch as the words used in the said Part III were "the net receipts from the bankrupt's pro-"perty," etc. Counsel referred to **In re Sircombe,** 1924 N.Z.L.R. 1016; 1924, G.L.R. 303, and the cases mentioned therein. Counsel for the Official Assignee submitted that the debts should be paid through the Official Assignee (which the Court, however, declined to direct to be done); or, alternatively, that the Court, having a discretion as regards granting annulment, should make it a condition of the annulment that the Official Assignee's commission should be paid. He cited the following:—**Re Taylor,** (1901) 1 K.B. 744; **In re Comyns,** 7 Ir. Ch. Rep. 294; **Williams' Bankruptcy Practice,** 12th Edition, pp. 129, 130, 131.

On the question of petitioning creditor's costs, counsel for the bankrupt submitted that such costs were payable only by virtue of Section 120 (a) (ii) of the Act, and that, for the same reasons as those mentioned in (4) above, such costs were not payable in this case. Counsel for the Official Assignee submitted that:—

(6) The adjudication was properly made, there being no attempt to attack it under Section 136 (a);

(7) The bankrupt having been properly made a bankrupt, the costs of petitioning creditor were a charge under Section 120 (a) (ii);

(8) It should be made a condition of the annulment that such costs be paid: **Williams' Bankruptcy Practice,** 12th Edit., 135; **Bayley v. Johnstone,** 7 Ex. at p. 265; **Sullivan v. Hughes,** (1904) 20 T.L.R. 393; **Re Beer,** 1903, 1 K.B. 628; **Re Gyll, ex parte Board of Trade,** 5 Mor. Bcy. Rep. 272.

Counsel for petitioning creditor adopted the argument of Counsel for Official Assignee as set out in paragraphs (6), (7), and (8) supra, and added:

(9) That bankrupt for his own reasons was applying for annulment in lieu of discharge. The Court had a discretion to grant or refuse annulment, and might therefore impose conditions. It would be inequitable to place a petitioning creditor in a worse position than in the case of a discharge.

(10) On adjudication the petitioning creditor's costs became a preferential claim against bankrupt's estate: s. 120 (a) (ii) and s. 100 (a). It was a condition precedent to annulment that all debts be fully paid: **In re Fisher,** 27 N.Z.L.R. 98.

STRINGER J., in an oral judgment, held that in the circumstances commission under the Act was not payable to the Official Assignee, and he would not make it a condition of annulment that such commission should be paid. He, however, made it a condition of annulment that the petitioning creditor's costs should be paid.

Solicitor for A. Whyte: **D. C. Chalmers,** Whakatane.
Solicitors for Official Assignee: **Goulding & Rennie.**
Solicitors for petitioning creditor, etc.: **McVeagh & Fleming.**

(Reported by C. C. Chalmers, Esq.)

Skerrett C.J. December 3, 1926; February 1, 1927. New Plymouth.

IN RE WILLIAM KERR, A BANKRUPT.

Bankruptcy—Deed of Arrangement—In favour of one creditor—Fraudulent preference—Act of Bankruptcy—Section 82, Bankruptcy Act—"Good faith."

Bankrupt was manager of the Stratford branch of the Union Bank of Australia, Ltd. He misappropriated certain monies of the bank, and with monies obtained from other sources supplied the funds for a Syndicate to purchase some timber rights and concessions near Hokitika. In consequence of the bankrupt's irregularities being discovered an inspector of the bank interviewed the members of the Syndicate interested in the timber rights and induced them to enter into a Deed of Arrangement to enable the bank to sell the timber-cutting rights and concessions purchased by Kerr, and out of the proceeds to pay to the bank in priority to all other claims all monies improperly advanced from the funds of the Bank by Kerr to any person, with interest.

Quilliam, jun., for Official Assignee.
O'Leary for Union Bank of Australia.
Coleman for Sullivan, Binnie and Robson.

SKERRETT, C.J.:

Before considering whether the execution of the Deed of the 9th July, 1925, is an act of bankruptcy or not, it is necessary to consider what equitable or other interest the Bank possessed in the timber-cutting rights acquired by the bankrupt partly by monies belonging to the bank appropriated by him to his own use. It is contended on behalf of the bank that what Kerr acquired with the bank's monies was a twenty five-thirty sixths interest in the timber-cutting rights. It is contended that Robson acquired six thirty-sixths, or a sixth interest in the rights, and that Sullivan acquired five thirty-sixths interest, representing his expenditure up to the sum of £1000, leaving a twenty five-thirty sixths interest, which, it was contended, was the property acquired by the bankrupt with monies of the bank. On behalf of the Official Assignee it is contended that what was in point of fact purchased by the bankrupt was the whole of the timber-cutting rights; that the interests, if any, of Sullivan and Robson were derivative from the bankrupt, and that the rights were bought with a mixed fund, consisting partly of the bank's monies and partly of the bankrupt's own monies. I am clearly of opinion that the Official Assignee's contention must prevail. What was purchased by the bankrupt was not a four-sixths or other undivided interest in the timber rights. The interest acquired by Robson under the agreement of the 20th December, 1924, was plainly derived from the bankrupt.

The case is to my mind the simple one of a person in a fiduciary position buying an asset partly out of funds which for this purpose may be treated as trust funds and partly out of his own monies. In such a case it is clear that the beneficial owner of the money so invested has a right only to a charge on the property purchased for the amount of the trust money laid out in the purchase. Had the purchase been effected entirely with monies of the beneficial owner, then that owner would have had a right to elect either to take the property purchased with his monies or to hold it as security for the amount of the money laid out in the purchase; or, as expressed by **Jessel, M.R.**, in **re Hallett's Estate** (13 Ch.D. at p. 709): "He is entitled at "his election either to take the property or to have a charge "on the property for the amount of the trust money." But where, as in this case, the trustee has mixed the money with his own, the beneficial owner can no longer elect to take the property, because, to use again the language of Jessel, M.R.: "It is no longer bought with the trust money simply "and purely, but with a mixed fund." He is, however, still entitled to "a charge on the property purchased for the "amount of the trust money laid out in the purchase." See also **Sinclair v. Brougham** (1914 A.C., 398); **Smith v. Cuningham** (34 N.Z.L.R., 385 at p. 392). In my opinion, therefore, the interest of the bank at the date of the Deed of Arrangement in the timber rights consisted only of a charge on all moneys belonging to the bank which could be traced to have been paid and expended by the bankrupt in the acquisition of the timber rights, together with interest, as will be hereafter mentioned. It was stated at the hearing that the money so far traced as laid out in the purchase of the timber rights was the sum of £5000 before mentioned.

We are now in a position to determine whether the Deed of Arrangement was or was not a fraudulent assignment of the bankrupt's property.

It is clear that the Deed of Arrangement goes far beyond the rights of the bank. The rights of the bank under the equitable charge was only to a lien for all monies belonging to it which could be traced to have been expended in the acquisition of the property, together with interest. The deed purports to charge the sale proceeds of the timber rights with all monies belonging to the bank improperly advanced by the bankrupt to any person, whether such monies could or could not be traced as having been invested in the purchase of the timber rights. I think that this was substantially an assignment of the whole of the bankrupt's assets. The bankrupt was not a trader, and his assets consisted of the timber rights, which were then regarded as valuable and turned out to be valuable, and a small interest in remainder in a property in Scotland which was never regarded as of considerable value, and which, in fact, only realised a sum of about £109. The only other asset was book debts, which were and proved to be valueless. It is clear, therefore, that by the Deed of Arrangement the bankrupt parted with his only substantial asset in favour of the bank and endeavoured to prevent that asset being administered in bankruptcy for the benefit of his unsecured creditors, whose debts amounted to the sum of £997 15s. I think that the facts bring the case within the authority of **In re Sharp** (83 L.T., 416); **Walkley's Trustees v. H. Walkley, Ltd.** (85 L.T., 491); and **David & Allard, in re Whinney** (1914, 2 K.B. 694).

It is, however, contended that although the transaction effected by the assignment might be an act of bankruptcy the bank is protected under the provisions of Section 82 of The Bankruptcy Act. It is well established that a creditor who takes an assignment of substantially the whole of his debtor's property in or towards satisfaction of a past debt may invoke the protection of Section 82, but to do so he must shew that he has acted in good faith.

It follows, therefore, that the Deed of Arrangement of the 9th July, 1925, must be set aside as against the Official Assignee, and the bank must account to the Official Assignee for the sale proceeds received and to be received by it of th timber rights, subject to all proper allowances and without prejudice to the equitable lien of the bank for all monies belonging to it which can be traced as having been applied by the bankrupt in the acquisition of the timber rights, together with interest as hereafter mentioned.

Solicitors for Official Assignee: **Govett, Quilliam & Hutchen**, New Plymouth.
Solicitors for Union Bank of Australia, Ltd.: **Bell, Gully, Mackenzie & O'Leary**, Wellington.
Solicitors for Sullivan, Binnie and Robson: **Rutherford, Macalister & Coleman**, Stratford.

Alpers J. February 4, 9, 1927. Wellington.

THE S.S. CITY OF NAPLES (Appellant) AND GOLLIN AND CO., LTD. (Respondent).

Carriage of goods by sea—Clean receipt—Pillage—Onus of proof—Procedure—Evidence of co-defendant disproving pillage while in its possession—Judgment against other defendant.

On October 10, 1926, eight cases of alarm clocks were shipped on board the s.s. City of Naples at New York for delivery to respondents at Wellington. The ship signed for these cases "in apparent good order and condition." On delivery to the Wellington Harbour Board, the tally clerk signed for them as being still "in apparent good order and condition." Respondent's carrier refused to accept one case because it had apparently been tampered with. When opened it was found that 34 out of 50 clocks were missing.

The respondent stated that he was unaware whether the missing clocks were lost by pillage whilst in the custody of the ship or the Harbour Board.

At the hearing appellant did not call evidence but closed his case after the evidence of respondent. The Harbour Board, against whom respondent claimed in the alternative, did call evidence, and this went to prove that the pillage did not occur while the case was in the Board's custody.

The Magistrate found that the pillage did not take place while the case was in the Board's custody, and gave judgment for that defendant, but found against the City of Naples.

Blair for appellant.
O'Leary for respondent.

ALPERS J.: On the authority of **Hawke's Bay Direct Supply Association, Ltd., v. Richardson & Co., Ltd.**, 1922 G.L.R. 324—cited in his judgment—the Magistrate held that the clean receipt given by the ship imposed on the owners the burden of proving that the case had not been pillaged while in their custody, and as no attempt had been made to discharge that burden he gave judgment against the owners for the amount claimed.

The appellant relies upon two grounds, the one a question of procedure, the other of principle:—

"(1) That in considering his decision the learned Magistrate took into account certain evidence given by the defendant, the Wellington Harbour Board, as part of its case, which evidence was not relevant to the issue against the defendant the captain and owners of the s.s. City of Naples, and the case as against such defendant was closed before any evidence was called by the defendant the Wellington Harbour Board."

"(2) That the appellant acknowledged the receipt of the package alleged to contain the goods the subject matter of this action 'in apparent good order and condition,' and that the said package was not proved to have been delivered by the said defendant in a condition not consonant with 'apparent good order and condition'."

The first of these two grounds of appeal is clearly not maintainable. The Magistrate's Court Act, Section 50, provides, in terms identical with Rule 64 of the Code of Civil Procedure in this Court, that where a plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants to the intent that in such action the question as to which, if any, of such defendants is liable, may be determined as between all parties.

The very basis of this procedure assumes that the plaintiff is unable to prove conclusively by his own evidence his claim against any one of the defendants. He informs the Court of all he or his own witnesses know of the wrong he has suffered or the damage he has sustained; he makes out a **prima facie** claim against one or the other or both of the defendants and leaves them to clear the matter up. If one defendant could entitle himself to judgment by merely refusing to lead evidence and declaring that he "closed his case" at the conclusion of the evidence called on behalf of the plaintiff, the special procedure provided by the Rule would be rendered nugatory; **a fortiori** if the other defendant adopted the same course.

This seems to be clear on principle, and the language of the Rule itself contemplates that the issue shall be tried out between all parties.

But apart from principle the question is settled by authority. The same procedure obtains and has for many years obtained in England under Rules identical in language with ours, though it was not till quite recently that the question came up for decision: **Hummerstone v. Laery**, 1921 K.B. 664. In his judgment in that case **Bray J.** observes that "the question is of considerable importance" and that "it is somewhat remarkable considering that it so frequently arises, that it is almost devoid of authority."

As to the second point, Counsel for appellant contends that the evidence does not warrant the conclusion that the case of clocks was not in fact "in apparent good order and condition" when delivered to the Wellington Harbour Board; that the Magistrate gives no specific finding on the point and did not, in fact, direct his mind to a consideration of this question. He rests his argument, therefore, upon the fact that the ship got from the Harbour Board a "clear receipt" identical in terms with that which it gave to the consignor, and that there is no specific finding that the case when delivered was in any worse condition than when it was received.

As to the "clear receipt": Counsel for respondent submits that the receipt from the Harbour Board to the ship is really a receipt from the ship to itself, and therefore of no evidentiary value. "The Harbour Board carrying on business "as a wharfinger is in respect of inward cargo the agent "of the ship to receive the cargo from the ship's slings, to "hold it for the ship, and to deliver it thereafter to the "consignees on the receipt of delivery orders issued by the "ship" (**per Salmond J. in U.S. and Australia S.S. Coy. v. Lyons**, 21 N.Z.L.R. 585; C.A. at p. 609).

"The Sea Carriage of Goods Act 1922," Section 5, relieves the consignee of the burden of proving the actual delivery to the ship of the goods claimed for. Sub-section 2 reads:

"When any package has been acknowledged in a bill of "lading or other shipping document to have been received "in good or apparent good order and condition, and is de-"livered in other than apparent good order and condition, "and is found to have been tampered with or pillaged, the "production of **bona fide** invoices shall be **prima facie** evi-"dence that the contents of the package were in accordance "therewith."

But to avail himself of this statutory provision the consignee must of course bring himself within it and prove that the goods were in fact delivered in "other than" apparent good order and condition. The appellant contends that the word "apparent" must be given a liberal interpretation and that it means, not apparent on a minute and microscopical examination, but apparent on such examination as is practicable and customary in the process of handling cargo.

It is true the tally clerk says that even on a minute examination he would have passed the case; but he admits that his actual examination, on which he gave the clear receipt, amounted only to a "casual glance;" his evidence, therefore, cannot have helped the Magistrate. The police officer, admittedly an experienced and skilful wharf detective, says you would have to look at the case closely to discover marks on it; but on the other hand the carrier detected the marks of pillage at once.

I see no reason to doubt that the Magistrate arrived at a sound conclusion and with proper regard for the practical exigencies of handling and examining cargo. The truth of the matter is that all these decisions on short delivery turn on inferences of fact and not on rules of law. The Magistrate has not in so many words given an express finding that the case when delivered to the Harbour Board was not in fact "in apparent good order," but such finding is clearly implied in his judgment, and seems to me a reasonable deduction from the evidence taken as a whole. (**Sanday v. Strath Steamship Coy., Ltd.**, 26 Commercial Cases, 163.)

Appeal dismissed, with costs £10 10s. and disbursements.

Solicitors for appellant: **Chapman, Tripp, Blair, Cooke & Watson.**
Solicitors for respondent: **Bell, Gully, Mackenzie & O'Leary.**

COURT OF ARBITRATION

November 29, 1926; January 25, 1927.

OAKES v. HOLLIDAY.

Workers Compensation—Domestic servant using home-made soap—Hands cracking—Subsequent infection—No accident.

Plaintiff is a domestic servant employed at Warkworth Hotel during 1926. In the course of her duties plaintiff used home-made soap containing caustic. Her hands became rough, the skin cracked, and the thumb became swollen and painful. The doctor expressed the opinion that the caustic caused the cracking. Eventually a portion of the thumb-bone was removed, which occasioned limitation of movement of the hand.

Action for compensation.

Sullivan for plaintiff.
Sellar for defendant.

THE COURT (per Fraser J.): There is no doubt that if a worker contracts a disease that is the consequential result of accidental circumstances arising out of and in the course of the employment, compensation is recoverable. There must, however, be proof of the accidental circumstances. If in the course of her work the plaintiff had abraded the skin of her hands, or had done something that caused a crack in the skin to re-open, and infection had entered through that abrasion or crack, she would be entitled to compensation

(**Saddington v. Inslip Iron Co., Ltd.**, 10 B. W. C. C., 624; **Carr v. Burgh of Port Glasgow**, 16 B. W. C. C., 331; **Seed v. Somerville**, 7 G.L.R. 199). Similarly, if the plaintiff had had some latent disease of the skin, which suddenly became aggravated by reason of the use, for a few hours, of soda and soap in connection with her work, and caused loss of earning power, she would be entitled to compensation (**Dotzauer v. Strand Palace Hotel**, 3 B. W. C. C., 387). In circumstances such as these, there is a sudden and unexpected happening. Some strain or knock, even though trivial in itself, is required to abrade the skin or re-open a crack in it, and this is regarded as an accident. In **Dotzauer's** case, the suddenness of the development of incapacitating symptoms after the use of soda and soap was considered sufficient to justify the Court in treating the case as one of injury by accident. On the other hand, except in cases of industrial disease coming under Section 10 of the Act, a morbid condition that is gradually contracted does not entitle a worker to compensation. Skin diseases caused gradually by continued exposure to chemical fumes or splashes, or by the continued use of shampooing ingredients, have been held not to be due to accident (**Evans v. Dodd**, 5 B. W. C. C., 305; **Petschett v. Preis**, 8 B. W. C. C., 44).

In the present case, it is clear that the roughening and cracking of the skin of the plaintiff's hands was a gradual process. It may have been due to the continued use of the home-made soap, though the expert evidence adduced was to the effect that the recipe adopted was a safe one. Even if the Court found that the use of the soap was the cause of the cracking of the skin, it would still, as has already been stated, be unable to find that the cracking was an accident in the proper sense of the word, and it would therefore be obliged to require proof that the bacilli that entered the plaintiff's thumb were of a species particularly associated with her work, and that the infection itself arose out of and in the course of her employment (**Grant v. Kynoch**, 12 B. W. C. C., 78). The medical witnesses were unable to express an opinion as to the origin of the infection, and the Court cannot hazard a guess as to where it came from. **Chandler v. Great Western Railway Company**, 5 B. W. C. C., 254.)

Judgment is for the defendant. Leave is reserved for him to apply for costs.

Dated this 25th day of January, 1927.

Solicitor for plaintiff: **J. J. Sullivan.**
Solicitors for defendant: **Sellar & Gardiner.**

CHINA.

(By Professor J. Adamson).

Of the many planks in the platform of the Cantonese or so-called Chinese Nationalists' platform, the following are from the point of international law the most interesting :—

To abolish the " unequal treaties " ; to draw up all treaties anew with due regard to equality and sovereignty ; to make the Republic of China stand on the same level in international affairs with other nations.

To effect the withdrawal of foreign military and naval forces stationed in China.

To abolish consular jurisdiction.

To restore to China the Concessions and Settlements.

To restore tariff autonomy.

Even if the Great Powers when they signed the Protocol of London of 1871, which declared that no power can be released from the engagements of treaties or modify their stipulations except with the consent of the contracting parties amicably obtained, merely did as Westlake put it, lip homage to the continuing force of treaties now abrogated by consent, and even if it be, as is contended by many, that the true principle is that all treaties are concluded subject to an implied condition **rebus sic stantibus** treaties cannot be denounced unless there has been an essential alteration of circumstances. China must then have at least some moral justification for its attitude. The plea that a treaty derogates from the sovereign of one of the parties has never been recognised as such a justification. Though an international agreement is never to be construed, if possible, as interfering with sovereign rights, many treaties even of the present day, e.g., the Treaty of Versailles, do seriously affect the independence and integrity of states. The phase " unequal treaties " is not an apt term of international law, though it is true the Romans speak of **foedera iniqua** the terms of which were more favourable to Rome than to the other party. The objection to the treaties appears to be that they prevent China from standing on the same level with other nations. Now there is no doubt that one of the theoretical principles on which modern international law was founded was that all nations are equal. But though in the infancy of that law, it was a potent factor for good, the principle has been ridden hard.

Of no society of either individuals or of peoples is it correct to say that its members are in all respects equal. Both in national and international law there are differences in " persons " so that the late Professor Holland was able to classify both systems in the same manner and to find in both a group of abnormal persons. According to him, no state however powerful and however civilized came within the family of nations—the normal persons of international law—which consisted of the aggregate of states that had inherited or adopted European civilization. It is scarcely necessary to recall that the League of Nations recognises certain peoples as being under tutilage. If on the one hand there has grown up since his time a tendency to expand the " charmed circle," on the other hand there is a strong feeling that the independence of state must give way to their interdependence, a feeling which has found practical expression in the Treaty of Versailles and such international instruments as the Statutes of the Transit and Communications Commission. Accordingly if China insists upon equality, which after all is only equality before the law, it cannot ignore the claims of other states and shut itself up from the rest of the civilized world. She can no longer complain of " uninvited intrusion."

The matter of Concessions is much older than international contact with China. From almost the first meeting of East and West they sprang up under the name of factories. A concession differs from a settlement in that in the former the land is leased from the Chinese Government by a foreign government who in turn subleases it to their nationals ; whereas in the latter the land is obtained directly from the Chinese owners. They resemble each other in that a Municipal Council entrusted with the functions of local government is elected by the foreign settlers, the Chinese inhabitants who now form the majority of the ratepayers, being ineligible as electors or as members of the Council, though it is provided that their delegates should be consulted on matters affecting the interests of the native residents. This, no doubt, is an anomaly, but it is to be remembered that the position is entirely one of China's own seeking, because the natives lured by commercial prospects have voluntarily taken up their residence in these quarters. It is further to be noted that not even in the Concessions has China surrendered its sovereignty, and they differ in this respect from foreign colonies like Hong Kong and from leased territories. The status of areas which have been leased to several powers is one of the most difficult because it is one of the most novel questions of inter-

national law. It is only in them with the exceptions first to be mentioned that foreign troops are stationed. The exceptions are the Legation Guards at Pekin, troops stationed between that city and the sea, and gunboats which keep open communications between the river ports.

The Chinese consider it a grievance that they have no control over the tariff, and assert that in this respect they are at a serious disadvantage compared with other nations, and that in particular they are unable to treat on equal economic terms with them. There can be no doubt that China is seriously handicapped both in this way and also in raising revenue for governmental purposes. Until recently China was restricted to imposing on foreign exports and imports a small (5%) ad valorem duty on such articles valued for this purpose at pre-war prices. This was one of the questions considered at the Washington Conference which appointed a Commission to investigate. The almost immediate result of the appointment of this Commission was an increase varying from 2½ to 5%. Since then there have been further advances, and foreign control will cease in 1929.

Closely connected with the tariff question is the administration of the customs. Nearly 70 years ago, in order to meet the earlier war indemnities China was compelled to place the collection of the custom duties at the then existing treaty ports under foreign supervisions, but after these indemnities had been paid off, at the request of the Chinese Government itself, which found the system of collection much better than any it had been able to devise, this supervision was continued, though it was at liberty to dispense with the services of the Foreign Inspectorate. When some forty years later China was again compelled to borrow money, abroad for the payment of new war indemnities, it agreed that the foreign administration of the customs should be retained—a condition repeated on the occasion of every fresh loan, until the whole of the customs revenues have been assigned in security for repayment. On the establishment of the Republic, in 1912, the Foreign Inspectorate was placed in sole charge of the customs revenue for the purpose of liquidating the outstanding foreign loans.

A minor grievance is that the Chinese remain ineligible for the higher positions in the customs service and that the number of foreign employees is twice that of natives in the service.

Before the reception of the principle of territorial sovereignty and jurisdiction which as students of international law know, is one of the basic tenets of the modern system, it was the custom for residents abroad to have their disputes settled by their fellow-countrymen, or in the case of traders of different nationalities, by one of their own number. Those judges were at first unofficial, but in course of time they were replaced by government officials. But whilst with the development of modern international law this practice began to die out in Europe, it was applied sometimes at the request of the local rulers to the so-called pagan countries. Perhaps one of the best known if not the earliest of these international agreements was the French Capitulation with Turkey in the 16th century. As European countries extended their relations with the East the system expanded until Consular Courts were to be found all over Southern and Eastern Asia. The justification for their establishment was that such local law as existed refused to recognise the foreigner as having status even equal to that of the native (in China every foreigner was a "tribute bearer," i.e., an inferior) and was corruptly administered so that there was no guarantee that the former would be treated with a "sufficient modicum of justice." The defects and disadvantages of the system to both parties are so obvious that as soon as the Western powers were satisfied that a pagan country had introduced laws of judicial procedure which at all accommodated themselves to their notions of justice the capitulations have been abolished, as in Japan, Siam, Turkey, though the denounciation by Turkey of the capitulation at the commencement of the Great War called forth several protests.

With regard to China, the Mackay Treaty with Great Britain of 1902 declares that China having expressed a strong desire to reform the judicial system and to bring it into accord with that of Western nations Great Britain agrees to give every assistance to such reform and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration and other conditions warrant her in so doing. A similar provision appears in treaties with other states about the same time. But China for some time made little progress in legal reform. The matter was again brought up at the Washington Conference of 1921, when it was resolved to establish a Commission to inquire into the present practice of extraterritorial jurisdiction and the administration of justice in China, and as to the means of improving the latter in such a way as would warrant the synatory Powers in relinquishing either progressively or otherwise their right of extraterritorality.

It is not known whether the members of this Commission have reported, as they were to do, to their respective governments, but so far none of these governments have released the report.

It is to be noted that not all even of the foreign treaty powers at present exercise extraterritorial jurisdiction. Russia and the Central Powers lost their rights during or at the end of the Great War, and China has consistently declined to grant them to the new states which have come into existence.

In addition to these grievances China complains of the manner in which the Treaty States and groups of their subjects, and Japan in particular, interpret or misinterpret the treaties; but this raises the general question of international law.

It does not seem impossible to meet the Chinese claims by an amicable arrangement, but the solution is more than usually complicated because, on the one hand, at present China cannot speak with one voice—the North and the South are engaged in civil war. The Central Government, amongst controlling forces of which there are differences, is unable to keep the provincial governors in check; on the other hand, because of the "most favoured nation" clause in most of the treaties any change would require the unanimous approval of all the treaty powers.

China talks of appealing to the League of Nations, but it is significant that China has refused to join with Belgium to submit to the Permanent Court of International Justice by means of a Special Agreement the question of the right of the former to denounce the treaty of 1865 between the two states. Belgium has intimated that she desires to take advantage of compulsory arbitration clause which both states have signed.

It is needless to add that a state contravenes no rule of international law by taking such measures as it thinks necessary to safeguard its subjects in a foreign country when the local authorities are unable to afford protection or, as has sometimes happened in China connive at the disturbance.

LONDON LETTER.

Temple, London,
Wednesday, 8th December, 1926.

My Dear N.Z.,—

Forgive me if my letter is short and not very much to the point; we are in the very midst of things, in **Crown Milling Company and Others v. H.M. The King,** before the Privy Council, and, as Luxmore K.C. had to return his brief at the last moment, owing to the prevalence of the Northcliffe case (to be mentioned later to Your Lordships), and Simon was elsewhere engaged on Tuesday while Myers was opening the case, I have a full day to-day boiling down all that was said into a digestible mess of potage for my learned leader to absorb shortly. The hearing began, in fact, on Monday afternoon, and, in the absence of Maugham K.C., Myers took the rostrum, if rostra are things which one takes. It is no reflection on Maugham K.C. to say that the Appellants lose nothing as a result; Myers, now having found his feet in this strange assembly, performs with us much as you (I fancy) are used to his performing with you; undoubtedly he does his work well, and, to cut a long story short, I expect Gresson, returning to your courts, has long ago told you that there is little enough difference between you and us, us and you, and that your goods are as good as our goods when it comes down to it. *Ignotum pro magnifico*, and let me add that, if only a return match on your home grounds could be arranged, our team would, I am quite sure, demonstrate the complementary proposition.

In **Doughty v. The Commissioner of Taxes,** the Board comprised the Lord Chancellor, Lords Shaw of Dunfermline, Wrenbury, Phillimore and Blanesborough. Two of these, you will observe as a curious coincidence, have yesterday pronounced judgment in the House of Lords dismissing the taxpayer's appeal in the not dissimilar case of **Martin v. Lowry.** The point in the latter case was by no means the same as the point in Doughty's case; but there is the similarity of circumstance that the revenue point to be decided in both cases arose upon a single transaction. In Doughty's case, in which judgment was reserved after some private discussion between their Lordships, Lord Blanesborough developed an early and an emphatic sympathy with the Appellant's arguments; but he is a man so intelligent and so charming, that the early forming of a view (be it right or wrong, adopted by his colleagues or rejected) is not unusual, and the emphasis with which he puts it to the other side is not in the very least unwelcome. He abounds with a smiling vitality. Lord Wrenbury, now very much aged from the Buckley we once knew, was of a like sympathy; Lord Shaw of, apparently, an opposite tendency; Lord Phillimore inclined to be with Lord Shaw, and the Lord Chancellor, whom I regard as the perfect President of a highest court, gave no very certain indication. It is a point of which the discussion is best, perhaps, reserved, until we know the judgment.

In **Gardner v. Te Porou Hirawanu and Others** (the Native Land case) the Board was composed of Lords Shaw, Wrenbury, Phillimore, Blanesborough, and Sir John Wallace, and it was in something of a hurry. It must be mentioned, however, that Lord Shaw took care to intimate that if the obvious importance of the case was such as, in effect, to necessitate a longer hearing, than the shortness of the point appeared to require and than their Lordships could immediately afford, arrangements could and would be made for an adjournment. Myers, with more than creditable judgment, elected to take the short point shortly and, throwing overboard any points on the law of Waste, determined to stand or (less probably) to fall on the covenants in the lease. It would certainly appear that upon the conclusion of our arguments and his junior's (Stamp) reply that Myers' handling of the case has achieved success for his side. Here again, their Lordships having reserved their judgment, it seems more appropriate to reserve our discussion.

Outside these matters, the most interesting case of the day is certainly **Re Viscount Northcliffe decd. Owen v. Viscount Rothermere and Others.** In a matter in which the press is so extensively and directly interested, it would be absurd to suppose that the press agencies have not kept you fully informed at your particular end of the earth. Whether or not, on a point of law, I may comment on a matter which is *sub judice* as I write, but which will presumably be *res judicata* when you read, I do not know, and I do not propose to take my opinion or still less to act upon it. The former Governor of Pentonville Prison is, as I write, about to be tried for writing what he should not, it is alleged, have written for publication. Though his section and mine would not be the same, I take warning from his present plight and elect not to do anything which might result in my standing my trial. I will express no views upon the rights or wrongs, or upon the lawyers' and the laymen's verdicts as at present formed. The case stands adjourned until to-morrow: I doubt therefore if we shall see Maugham at all at the Privy Council in our current affairs.

As to recent decisions, I have already commented, at its earlier stages, upon the revenue matter, above referred to, **Martin v. Lowry.** The case arose, you will remember, upon that astonishingly vast and astonishingly bold venture in Government Disposals Board linen; and it involves the question, now finally answered to the taxpayer's disadvantage:—can a single deal, speculative and so isolated that the dealer cannot be said to be in that line of business, be viewed by Commissioners as a trade or business or other project of an income-bearing- as distinct from a capital-improving, nature? The utility of the decision, from that professional point of view which must necessarily be yours and mine, is somewhat reduced by the manner in which Lords Sumner and Carson have dissociated themselves from the *ratio decidendi*, in its entirety, at first instance. I express myself ill; I mean that they are unwilling to accept that reasoning entirely. In shipping matters **Merchants' Marine Insurance Company Ltd. v. North of England Protecting and Indemnity Association** has the interest (prime, I think we may say) of deciding what is a "ship." In **Ocean Coal Company Ltd. v. Davies** a question of workmen's compensation is dealt with by a negative answer: when a workman upon his own admission is recovered, is there still necessity to pay compensation until the liability is formally terminated in one of the manners provided in the Act?

Not without reason does the London "Times" of December 1st, introduce **Haywood v. London and North Eastern Railway Company** by the headline: "Novel Action against a **Railway Company.**" As is usual in this country, dry grass and the like was being destroyed by fire by the Company on its rail-road. The smoke blew across the high road and temporarily blinding a motor-driver caused him to crash. The decision, favourable to the railway company, was no doubt one of fact; but, in questions of remoteness of damage and upon that now somewhat discredited legal slogan "*causa causans*," these matters of fact have some element of precedent for us, especially when (as here) the direction