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"The arms that an advocate yields he ought to use as a warrior, not as an assassin."
—Sir Alexander Cockburn.

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Articles.

The resolution of the Law Conference approving a return to the system of Articled Clerks is likely to be barren of result unless some steps are taken to set up a Committee to enquire into our present educational system and to report as to what should be the relation of the student's reading to lectures and to practice. The problem that gave rise to the resolution is an old one, a serious one and one difficult to solve. Coke saw this and warned the student that he could not safely neglect either method of acquiring legal knowledge. "There be two things" he said "to be evaded by him as enemies to learning, *proepostera lectio* and *proepostera praxis*."

The question of the relation of reading to lectures is one of interest to all branches of education, and is at present receiving a good deal of attention because of the criticism that is being directed to the manner and mode of lecturing at English Universities. *Prima facie* the relation that will exist between these two methods of acquiring learning will vary according to the ability of the lecturer, but some go as far as to say that owing to the very excellent text-books on all branches of law available to students at reasonable prices the lecture, except in rare cases, plays a very subordinate part. Even if it be true, however, that the text-book has relegated the lecturer to a position of minor importance, it is certainly true that a complete course of both reading and lecture will not make, without practical exercise in the law, a competent Barrister or Solicitor, and the resolution of the Law Conference is founded on the belief that the exercise in the practice of the law which must be added to knowledge of principles, if competency is to be assured, should be acquired before and not after admission to the ranks of the profession. The propriety of such belief in the interests of the community and the profession is unquestionable, and there should be no difficulty in obtaining such general agreement on the principle involved as would lead to its enforcement, but it is doubtful whether a return to the system of Articles as in force till 1882 would achieve the desired end or meet with general approval.

The time within which the necessary learning from reading and lecture, whatever standard is set up, can be acquired, will vary with the individual, and it is not unusual for students of ability to demonstrate to examiners the sufficiency of their reading after two years of preparation, and, as examination is the only practical test of sufficiency in theoretical knowledge, it is not reasonable to retard the advance of the more able by the progress of the average. Examination, however, is not so reliable a test as to sufficiency in the practice of the law and the application of legal principle as it is in knowledge of principle, and, because of distrust of examination as a reliable test in this particular, the profession of the law has in conformity with other professions relied chiefly on the effect of a period of service in the profession sufficiently long to ingrain habit and familiarity with practice and tradition to ensure the desired proficiency in practice. The method adopted to secure this practice in the profession was that known as Articles, and the period of service was five years. The system still obtains in England, and obtained in New Zealand till 1882, when the Legislature dropped any requirement of service or practice in the profession as a condition of admission. In New Zealand, since 1882, the only necessary qualification so far as competency is concerned has been sufficiency by the test of examination.

The change was not promoted or desired by lawyers. The agitation was promoted by persons outside the profession, who found the chief barrier to entrance the time or cost of service under Articles required before admission. The vulnerable parts of the system against which criticism was most effectively directed were the failure of the solicitor to teach, the amount of the premium he charged, and the difficulty the increasing number of young men desirous of entering the profession found in finding solicitors who had places for them as Articled Clerks. The system as it stood, did not in fact allow the profession to expand to the extent and at the rate demanded by the growth of the Colony, and the circumstances and ambition of the people. Modification and deletion of objectionable features was clearly necessary but the total elimination of practice in the law was unnecessary and has, as was to be anticipated, proved detrimental in the long run to both profession and public.

The conditions to-day are very different so far as the proportion of lawyers to population is concerned from what they were in 1882, and the number in the profession and the increased facilities for travel and communication render the profession well able to educate and absorb such further numbers as can possibly be required by the growth of the community. But though the profession can meet the reasonable demands in this respect the covenant to teach contained in Articles could not if such covenant means personal supervision be in substance performed. All that a solicitor now-a-days can do is to admit a student to office so that he can learn. But he must also work as a member of the staff, and for that he is entitled to be paid. Unpaid students assume a liberty and freedom which is disastrous to the efficiency of an office staff, and it is not likely that a return to the system of articled clerks that would continue this feature would be tolerated by solicitors working under present-day conditions. The covenant to teach and the payment and premium belong to the past, and it is to no one's interest to revive them as ingredients in the system of legal education. Practice in the law can and should be enforced without these archaic features and the time is ripe for the profession to demand that exercise in the practice of the law should again precede admission, not follow it. Unless the profession itself proclaims the standard of education and fitness required for its members, no one else is likely to interest themselves in the matter to the advantage of the profession, but, if the demand for insistence on practice as well as examination includes a right to premiums and excludes salaries as at present paid, it would be very difficult to justify.

Court of Appeal.

Skerrett, C.J.
Sim, J.
Reed, J.
Adams, J.

March 26, 27; April 2, 1928.

BLACK AND WHITE CABS LTD. v. ANSON.

Practice—Motion that Judgment be Entered for Defendant—Whether Case Should be Withdrawn from Jury—Motion for New Trial—Whether Findings of Jury Defective—Form of Issues—Whether Specific Questions as to Contributory Negligence Necessary—Verdict Against Weight of Evidence.

In this case a motor cycle belonging to the plaintiff collided with a taxicab belonging to the defendant. Plaintiff alleged that the collision was due to the negligence of the driver of the taxicab in that the car was being driven on the wrong side of the road. Defendant denied that there was negligence on the part of the driver and alleged that the collision was due to the negligence of the plaintiff in driving his motor cycle on the wrong side of the road and in failing to keep a proper look-out. The case was tried before McGregor, J., and a common jury of 12, when two issues were put to the jury on the question of negligence. The jury found in favour of the plaintiff. The defendant moved that judgment be entered in its favour or in the alternative that a judgment of non-suit be entered and as a further alternative for a new trial on the grounds: (a) that the verdict was against the weight of evidence, and (b) that the findings of the jury were so defective that it was impossible to give judgment on them. The motion was dismissed by MacGregor, J., and this appeal was brought from the decision. The motion for non-suit was abandoned.

Watson for appellant.
Hislop for respondent.

SIM, J., delivering the judgment of the Court of Appeal, said that the first question to be determined was whether or not the defendant was entitled to have judgment entered in its favour, notwithstanding the verdict of the jury. If on the undisputed facts of the case the only rational inference was that the plaintiff was guilty of contributory negligence it was the duty of the Judge to withdraw the case from the jury and give judgment for the defendant. If, however, there was any dispute as to the facts from which the inference of contributory negligence was to be drawn the issue must be left to the jury, whatever might be the preponderance of the weight of evidence in favour of the defendant: **Salmond on Torts** (6th. Edn.), p. 38; **Dublin Railway Co. v. Slattery,** 3 A.C. 1155; **Wakelin v. London and S.W. Railway Co.,** 12 A.C. 41. The ground on which the defendant's application was based was the supposed failure of the plaintiff to keep a proper look-out. If the plaintiff, it was said, had been keeping a proper look-out he, on his own admission, would have seen the approaching car and could have avoided it. But if the plaintiff had been keeping a proper look-out and had seen that the car was approaching on the wrong side of the road, why, the Court asked, should he assume that the driver would not go to the proper side of the road in time to avoid a collision? Then there was a further difficulty in the way of the defendant's application. Both vehicles were lighted, and the driver of the car had an equal opportunity of observing the approaching cycle. In those circumstances the plaintiff's failure to keep a proper look-out would not disentitle him to recover if the driver of the car, by the exercise of care on his part, might have avoided the consequences of the plaintiff's failure: **Tuff v. Warman,** 5 C.B. N.S. 573, 585; **British Columbia Company v. Leach** (1916) A.C. 719, 724. It was clear, therefore, that before granting the defendant's application the Court would have to determine disputed questions of fact which it was the province of the jury to determine, and which they must be taken to have determined in favour of the plaintiff. The Court was not entitled to do that, and Mr. Justice MacGregor was right, their Honours thought, in dismissing the motion for judgment in favour of the defendant.

There remained then for consideration the motion for a new trial, which was based on two grounds. The Court dealt first with the objection that the findings of the jury were so defective that it was impossible to give judgment on them. The issues put to the jury did not deal specifically with the question of contributory negligence. Those issues were as follows:

(1) Was the defendant guilty of negligence in that its cab was being driven on the wrong side of the road?
(2) If so, was the negligence of the defendant the real direct and immediate cause of the accident?

Mr. Watson contended that there should have been a specific question put to the jury on the subject of contributory negligence. The questions put to the jury were framed by Mr. Justice MacGregor, and were agreed to, he said, by counsel. If Mr. Watson desired to have a specific question put as to contributory negligence he should have made an application on the subject, and, having agreed to the issues as framed, he was not entitled at that stage to complain of the way in which the case was left to the jury: **Seaton v. Burnand** (1900) A.C. 135, 143; **Steele v. Corporation of Belfast** (1920) 2 I.R. 125, 139. The jury must have considered the question of contributory negligence in connection with the second issue, and the answer to that issue amounted in effect, to a finding that the plaintiff had not been guilty of any negligence. The findings, therefore, were such that judgment could properly be entered on them.

The Court considered it desirable, however, to say something about the issues that were put to the jury. They were the same as the questions on which Lord O'Brien, L.C.J., of Ireland, always tried cases of the kind: **Butterly v. Mayor of Drogheda** (1907) 2 I.R., 134, 138. In that case a specific question was put to the jury by the trial judge as to contributory negligence, and it was on the answer to that issue that judgment was given for the defendant. Their Honours thought that in every case where contributory negligence was alleged a specific question on the subject should be put to the jury. Such an issue was a common form in England: **Beven on Negligence** (4th Edn.) p. 237, note (u). The subject of such issues was dicusssed by Lord Justice O'Connor in an article in 38 Law Quarterly Review, p. 17. It appeared to the Court that in the present case the proper issues would be:—

1. Was the defendant's driver guilty of negligence by driving the car on the wrong side of the road?
2. Was the plaintiff guilty of negligence by:
   (a) Riding his cycle on the wrong side of the road?
   (b) Riding at an excessive speed?
   (c) Failing to keep a proper look-out?
3. If both were negligent, whose negligence was the real cause of the collision?

The other ground on which the defendant asked for a new trial was that the verdict was against the weight of evidence.

Upon a careful consideration of the evidence the Court came to the conclusion that the verdict was one which the jury, viewing the whole of the evidence reasonably, could not properly find.

Appeal allowed and order made for new trial.

Solicitors for appellant: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for respondent: **Brandon, Ward and Hislop,** Wellington.

Supreme Court.

Adams, J.

April 19; 27, 1928.
Christchurch.

FREE & McCROSTIE v. STEWART.

Tort—Fire Caused by Sparks from Traction Engine Passing Along Road—Absolute Liability at Common Law—Whether Section 12 (1) Motor Vehicles Act 1924 Conferred Immunity from Common Law Rule—Whether Statutory Authority Imperative or Permissive.

Appeal from the decision of Magistrate on points of law.

The facts found by the Magistrate were that the appellants were haulage contractors, and employed in their business a traction engine which emitted sparks when in use; that on 22nd February, 1927, when this engine was being driven along the road bounding the respondent's farm, a fire occurred in the respondent's hedge, and that this fire originated from sparks from the engine. The Magistrate also found that the appellants had taken all possible steps to minimise the danger. He held, however, as matter of law, that on the facts the appellants were liable in damages without evidence of negligence.

Sargent for appellants.
Upham for respondent.

ADAMS, J., stated that counsel for the appellant did not dispute that, on the authorities cited, to which might be added **Mansell v. Webb** (1919), 88 L.J.K.B. 323, and **Slater v. McLellan** (1924) S.C. 854, the appellants would be liable at common law without proof of negligence. He contended, however, that the use of such engine on the public roads was expressly authorised by Section 12 (1) of the Motor Vehicles Act 1924, and that this authorisation conferred immunity from the absolute common law liability in such cases. That argument, however, did not distinguish between imperative and permissive statutory authorities. The distinction was stated by Lord Watson, in **Metropolitan Asylum District v. Hill,** 6 A.C. 193 at p. 213, and was discussed by Sir John Salmond in his book on Torts (1924), 6th Edition, pp. 280, 281. As was pointed out by Lord Clyde in **Slater v. McLellan** (*supra*) the use of traction engines on public highways was not legalised by statute; they get on the public roads by common law right, and in the absence of a statutory immunity their use on the roads was subject to the common law liability. The principle established by **Rylands v. Fletcher,** L.R. 1 Ex. 265, 279; affirmed in L.R. 3 H.L. 330, was therefore applicable in cases such as the present and the liability was, therefore, independent of negligence—**Powell v. Fall,** 5 Q.B.D. 597; **Mansell v. Webb** (*supra*); **Slater v. McLellan** (*supra*).

His Honour added that the provisions of the Motor Vehicles Act were restrictive and not enabling—they prohibited the use of motor vehicles without a license. By virtue of Section 12 (1) a license granted under the present Act applied to every road or street in the Dominion.

Appeal dismissed.

Solicitors for appellants: **Slater, Sargent and Dale,** Christchurch.

Solicitors for respondent: **Harper, Pascoe, Buchanan, and Upham,** Christchurch.

MacGregor, J. April 20; 24, 1928. Auckland.

FRANKHAM v. McLISKY AND KEITH.

Lien—Wages Protection and Contractors' Liens Act 1908—Notice of Intention to Claim a Lien—Personal Service Required—Notice Forwarded by Registered Post and Returned Insufficient.

Claim for lien under Wages Protection and Contractors' Liens Act 1908. The facts appear sufficiently from the report of the judgment.

Finlay for plaintiff.
Gould for Dr. Keith.
Butler for Wallace and Co. and Another.
Herman for Smith and Smith, Ltd.
Milne for Official Assignee and Others.

MACGREGOR, J., said that the plaintiff sought to establish a lien on a parcel of land belonging to the defendant McLisky, under and in terms of Section 55 of the Wages Protection and Contractors' Liens Act 1908. By his statement of claim the plaintiff alleged (*inter alia*) that notice of his intention to claim a lien had been given to the defendant on 28th October, 1927. The first question to be determined was whether that allegation had been proved. If it had not, then it was clear that no statutory lien could be established in view of the express provision contained in Section 55 (4) that if no such notice were given the lien should not attach.

His Honour stated that by Section 55 (1) it was provided that a person who intended to claim a lien under that section should before the completion of the work or within thirty days thereafter "give notice to the owner" in, or to the effect of, the appropriate form given in the third schedule to the Act. No express provision was made in that part of the Act for the service of such notice either personally or otherwise, nor for substituted service nor for dispensing with service thereof. All that was required was that the person claiming the lien should give notice to the owner of his claim in the specified form, so that the owner might "on receipt of notice" retain sufficient money to satisfy the claim in terms of Section 58 (1). In other words, it appeared that the essential thing was that the notice itself should be brought to the notice of the owner. It seemed to His Honour that that necessary fact should as a rule be established by proof of personal service of the notice on the owner. If for any reason service could not so be effected, then the plaintiff must, His Honour thought, produce satisfactory evidence that the terms of the notice were brought home to the notice or knowledge of the owner in some other way. It was of course for the plaintiff to convince the Court, in one or other of those ways, that he did in fact "give notice to the owner" in terms of Section 55 (1). In the present case His Honour was not so convinced. It was admitted that personal service of the notice was not effected, although efforts were made to effect such service on 28th October, 1927. On the same day a copy of the notice was forwarded by registered post addressed to the defendant McLisky at his home in Auckland, but this was returned by the Post Office some days later, unopened and marked "not called for" and "return to sender." In those circumstances it was obvious that the plaintiff had failed to "give notice to the owner" of his claim in terms of Section 55 (1), and accordingly that his present application could not succeed.

Summons dismissed.

Solicitors for plaintiff: **Blampied and Hayman,**
Solicitors for Dr. Keith: **Morpeth, Gould and Wilson.**
Solicitors for Wallace and Co. and Another: **Stewart, Johnston, Hough and Campbell.**
Solicitors for Smith and Smith Ltd.: **Napier, Herman and Smith.**
Solicitors for Official Assignee and Others: **Milne and Meek.**

Ostler, J. April 19, 1928. Wellington.

PECK v. PORUTU AND OTHERS.

Practice—Prohibition—Certiorari—Native Land Court—Jurisdiction—Order Laying Off a Private Way to Give Access to Certain Lands—Whether Native Land Court Had Power to Make Such Order—Sections 49 and 50 Native Land Amendment Act 1913—Determination of Facts Essential to Give Court Jurisdiction—Whether Prohibition Lies if Facts Erroneously Decided.

Motion for a Writ of Prohibition to prohibit a Judge of the Native Land Court from making an order laying off a private way through Subdivision 1 of Section 36, Hutt District, for the benefit of the defendants Porutu and Hardy. There were alternative claims for a writ of certiorari or for an injunction. The facts showed that the original order of the Native Land Court dividing Section 36 into six parcels did not lay off a road line or right-of-way over Subdivisions 1, 2 3 or 4, although such a road line appeared in the subdivisional plan in accordance with which the order was granted. In 1904 a Land Transfer Title was issued for Lot 1, and the plaintiff became registered owner. The line laid off across the subdivisional plan was attempted to be used as a road by the purchaser of one of the lots, but it was decided in **Tait v. Porutu,** 1 G.L.R. 96, that there was no road or right-of-way over this line. In November, 1927, the Chief Surveyor applied to the Native Land Court to have the strip of land comprised in the said road line, which had been excluded from the titles issued on the subdivision, revested in the original owners. The defendants Porutu and Hardy, who owned other sections in the subdivision filed an application to the Court for a road line or private way over this strip of land to give better access to their sections. The Court made an order vesting part of this strip of land in the plaintiff. On the same day it made an order laying off a private way to give access to the land owned by the defendants Porutu and Hardy. The Court declined to grant compensation to the plaintiff in respect of the right-of-way. The plaintiff claimed that the order was made either wholly without jurisdiction or in excess of the jurisdiction of the Court.

Hanna for the plaintiff.

OSTLER, J., stated that in his opinion the Native Land Court had jurisdiction to make the order it did under Sections 49 and 50 of the Native Land Amendment Act 1913. That Court decided that the plaintiff's section was Native freehold land. Whether it was right or wrong in that conclusion it certainly had jurisdiction to determine the point. If the plaintiff's subdivision was Native freehold land, then the strip of land awarded to her was also Native land. Clearly the Court had jurisdiction by virtue of Section 50 of the Act of 1913, if it thought that the adjoining Native freehold of the defendant Porutu required

better access to lay off over this strip of land a private way. It was contended that "better access" did not mean "additional access." His Honour could not see why it should not have that meaning.

With regard to Hardy's subdivision which the Court held to be European land, this land did not adjoin the plaintiff's land over which the private way was laid out. It was adjacent but not adjoining. That was a question of fact, however. It was well settled that where certiorari was taken away by Statute, as in the present case, an objection of want of jurisdiction could not be entertained solely on the ground that the Court had erroneously found a fact which was essential to the validity of its order, but which it was competent to try: **Colonial Bank v. Willan,** L.R. 5 P.C. 417. His Honour considered that that principle applied, and referred to **In re Roche,** 7 N.Z.L.R. 206. Further, the Native Land Court had, in His Honour's opinion, power to make the order under Section 49 of the Act of 1913, if it came to the conclusion of fact that Hardy's land had not "reasonably practical access to any public road." Hardy's section had access to a public road, but it was a long and narrow section. It was a question of fact whether that access was reasonably practicable. His Honour stated that the Court must assume that the Native Land Court had decided that access was not reasonably practicable. There was no appeal to the Supreme Court from that decision, and whether the Native Land Court decided it rightly or wrongly was, therefore, of no concern, as long as the Native Land Court did not exceed its jurisdiction in so deciding it.

Motion dismissed.

Solicitors for plaintiff: **Duncan and Hanna,** Wellington.

Blair, J. March 30, 1928.
Auckland.

IN RE THE AUCKLAND PIANO AGENCY LTD.

Practice—Discovery—Rule 161—Petition for Compulsory Winding-up of Private Company—Claim for an Injunction Under Rule 466—Whether Order for Discovery Obtainable in Such Proceedings—Whether Proceedings "Actions" Within Section 2 Judicature Act 1908—Section 253 Companies Act 1908.

Application for an order for discovery against the respondents in a petition for an order for the compulsory winding-up of a company, and also against the defendants to a statement of claim for an Injunction under Rule 466. The petitioner or plaintiff, The New Zealand Guarantee Corporation Limited, was creditor of a private company which went into voluntary liquidation with a view to reconstruction. The reconstructed company took over the assets of the company and subsequently gave to one of its shareholders a bearer debenture conferring a first charge on the assets of the new company. The new company went into liquidation and the debenture-holder appointed a receiver who collected some of the assets of the company. It was contended that the debenture was a fraudulent preference. The Corporation applied by petition for a compulsory winding-up order, and also issued a statement of claim for an Injunction under Rule 466 to restrain the debenture-holder from realising on the assets of the company. An application was made in each of these proceedings for an order for discovery, but was opposed. It was assumed that if the action were an ordinary action discovery would be proper and necessary. The question was whether discovery could be obtained in such proceedings.

Beckerleg for petitioner.

Burt for debenture-holder and for receiver.

Hogben for liquidator of reconstructed company.

BLAIR, J., dealing with the proceedings under Rule 466, stated that the rule provided for the issue of an injunction on a statement of claim without a writ. Rule 161 authorised any party to an "action" to obtain as of course an order for discovery. "Action" was defined in Section 2 of the Judicature Act. In **In re Licensing Act re Harris,** 7 G.L.R. 439, Cooper, J., said that a motion for a writ of *certiorari* was an "action" within Section 2 of the 1882 Act which section was re-enacted in the Judicature Act. He said also that Rule 567 (the present Rule 604) could also be invoked if necessary. Williams, J., in **Wallace and Fiord Hospital v. Southland Hospital and Charitable Aid Board,** 8 N.Z.L.R. 259, ordered inspection in a mandamus proceeding. If the rules applied to proceedings in mandamus and *certiorari* both of which could be obtained on motion, *a fortiori* they applied to injunction proceedings commenced by a statement of claim. The discovery asked for in the injunction proceedings was therefore ordered.

The further question was whether a creditor petitioning for the compulsory liquidation of a company was entitled to discovery against all or any of the parties made respondents to the petition. Respondents objected to the order on the following grounds: they said the Court had no jurisdiction to make the order because the proceedings were regulated by the Companies winding-up rules; that rule 75 of those rules which made applicable the rules of the Supreme Court Code limited such applicability to cases not provided for in the Companies Act or the winding-up rules; it was further contended that Section 253 of the Companies Act empowered the Court, where an order had been made for winding-up, to make an order for the inspection of the company's books and papers by the creditors or contributories; that that provision provided for the case of inspection and had the effect of excluding from application the rules for discovery in the Supreme Court Code; that the only discovery or inspection allowed in a proceeding under the Companies Act was discovery after and not discovery before a winding-up order. It was further contended that a proceeding under the Companies Act was not within the rules relating to discovery or inspection because such a proceeding was not an "action."

His Honour did not see how it could be said that because there was in Section 253 of the Companies Act special provision entitling the Court after the making of a winding-up order to give creditors and contributories generally full access to the company's books and papers, that special power must be taken to exclude the right of the Court to call for discovery where a company was threatened with liquidation. The present case was one where an inspection of the books and papers of the old company and the reconstructed company would materially assist the Court in deciding whether the allegations made in the petition had or had not been sufficiently established to justify the Court in saying that it was "just and equitable" that the company should be wound up by the Court. The Court had very wide powers under Section 183 of the Companies Act. Assuming the Court had under the code power to order an inspection, it seemed clear that rule 75 of the Companies (winding-up) Rules was ample authority for the exercise of such power. The whole of the powers and authorities of Judges sitting in chambers were made exercisable.

The last point raised by the defendants involved the question whether a proceeding instituted by petition was one in which inspection could be ordered. Rule 604 which dealt with cases not provided for and clothed the Court with authority to deal "in such manner as such Court deems best calculated to promote the ends of Justice until a new rule or rules is made," could be resorted to if other power were wanting. The Court was by that rule also required to apply the rule most apt to any case not provided for. Salmond, J., in **In re Pukuweka Sawmills Ltd.** (1921) G.L.R. 465, pointed out that there were four ways of originating civil proceedings in the Court. There were: (a) Writ of Summons; (b) Petition; (c) Originating Motions; (d) Originating Summons. A great many proceedings were commenced by petition, notably matrimonial causes, bankruptcy proceedings, several proceedings under the Trustee Act and proceedings under the Companies Act. The rules as to discovery and interrogatories were specially made applicable to matrimonial proceedings so that as far as the form of the proceedings was concerned no difficulty arose.

The question was whether a petition was a civil proceeding commenced by a writ or in such other manner as might be prescribed by the rules of Court. The **Pukuweka Sawmill** case, if authority were needed, was sufficient authority for the statement that a petition was a civil proceeding, and the rules provided how it was to be commenced. Could it not therefore be said that a petition was a civil proceeding commenced as prescribed by rules of Court? If this were so then a petition was an "action" within Section 2 of the Judicature Act, and it followed that Rule 161 applied. There were authorities where it had been laid down that proceedings not strictly "actions" in the limited sense of the word were actions within Section 2 of the Judicature Act. For instance: a summons to enforce a lien under The Wages Protection and Contractors Liens Act 1908, **Haddock v. Pedersen** (1916) N.Z.L.R. 1181; a motion for rectification under the Patents Designs and Trade Marks Act, **Kiwi Polish Co. v. Kempthorne, Prosser and Co.,** (1921) G.L.R. 198.

During the hearing it was contended that the summons was premature because no application had been made for inspection and there had been no refusal, and certain authorities were

cited on the point. Upon the facts admitted His Honour held that there had been a refusal.

Order for inspection made in each proceeding.

Solicitors for petitioners: **B. Beckerleg,** Auckland.

Solicitor for debenture-holder and the receiver: **A. Hanna,** Auckland.

Solicitors for liquidator: **Melville, Ferner and Broun,** Auckland.

Blair, J. March 31, 1928. Auckland.

McCALLUM v. OFFICIAL ASSIGNEE OF LAGAR AND LUSTY AND THE AUCKLAND EDUCATION BOARD.

Lien—Wages Protection and Contractors Liens Act 1908—Education Board—Whether Lien Applies to Contracts Let by Education Board—Whether Education Board the Crown and Entitled to His Majesty's Prerogatives—Education Act 1914.

Summons to enforce a lien. The question arising was whether the Wages Protection and Contractors Liens Act 1908 was binding upon an Education Board. The Education Board mainly relied on Section 6 (j) of "The Acts Interpretation Act 1908" making inapplicable to His Majesty any statute unless expressly stated therein that he should be bound thereby; also **The Queen v. Remnant,** 14 N.Z.L.R. 256, and **In re Buckingham** (1922) N.Z.L.R. 771.

Leary for the plaintiff.

Towle for the defendants.

BLAIR, J., stated that the first question to be decided was whether an Education Board was the Crown, and entitled to all His Majesty's prerogatives.

Education Boards were incorporated under Section 24 of the Education Act 1914. Section 32 conferred wide powers for *establishing schools and administering funds.* Section 33 dealt with its funds—general and special. The general fund consisted of general grants from the public funds, rents and profits from lands not subject to any special trust, fees, donations, etc. Special funds comprised specially allocated grants or specially earmarked funds or trusts. Subsection 6 of Section 33 (as amended in 1917) required that moneys received from insurances on burnt schools, etc., should go into a special fund and that grants for new schools or residences were to be in another special fund. Section 38, Subsection 3, which provided for the audit of accounts by the Audit Office, did not say the funds were public funds. It inferentially said they were not public funds. The title to all school properties was in the name of the Board. Section 158 exempted the school-houses and teachers' residences from local rates. Section 159 dealt with Government subsidies on voluntary contributions or bequests made for educational purposes. Those subsidies were payable into the Board's funds. It could be seen, therefore, that although it was possible that the majority of an Education Board's funds were derived from Government Grants a considerable portion of those funds might come from other private sources.

Defendants relied mainly upon Chapman, J.'s decision in **Wanganui Borough v. Wanganui Education Board** (1923) N.Z.L.R. 524. Where land acquired by an Education Board for the erection of a students' hostel, and vested in the Board was held to be Crown land and exempt from rating. Chapman, J., was, however in that case dealing with land vested in an Education Board for the purpose of a Technical School and not in respect of ordinary schools, and referred to Part VIII of the Act as showing that the controlling authority in Technical Schools was the Minister of education. His Honour did not think that Chapman, J., intended to decide that all land vested in an Education Board for Educational purposes was Crown land. Chapman, J., had treated the Board as a different entity from the Crown. Section 24 of the Act constituted the Board a body corporate with perpetual succession *to do or suffer everything bodies corporate might do or suffer.* The wording was similar to that of the sections under which boroughs councils, harbour boards, *dairy control boards and no doubt many other public bodies* were incorporated. The lands held by an Education Board might or might not for certain purposes be Crown lands, but it by no means followed that because the Crown was so to speak *cestui que trust* of some of the Education Board's land the Board itself was the Crown and entitled to the benefit of the exemption claimed. Section 24 was quite clear in its meaning. It constituted a separate legal entity capable of doing and suffering anything that bodies corporate might do or suffer.

That the legislature contemplated that the Wages Protection and Contractors Liens Act 1908 would apply to public bodies undertaking works for public purposes was shown by Section 94, which exempted land belonging to such bodies from the operation of the rights and remedies conferred by the Act. That section *inferentially* gave rights against such bodies excepting rights affecting land.

His Honour concluded that an Education Board was not the Crown and that therefore the plaintiff had as against the Board all a subcontractor's liens. It was not necessary to decide whether the Wages Protection and Contractors Liens Act applied to the Crown.

Solicitors for plaintiff: **Bamford, Brown and Leary,** Auckland.
Solicitors for defendants: **Towle and Cooper,** Auckland.

Blair, J. March 27; 28, 1928. Auckland.

BERMAN AND BURTON v. CUMMACK AND TOTMAN.

Landlord and Tenant—Lease—Agreement to Sublease—Option to Lessor to Terminate Lease or Reinstate Premises on their Destruction by Fire—To be Exercised by Notice in Writing Within Fourteen Days After Date of Destruction or Damage—Construction—Failure to Exercise Option Within Time Prescribed—Whether Lessee Entitled to Treat Lease as Determined.

Originating Summons under Declaratory Judgments Act, 1908, for interpretation of an agreement to lease. On the 18th August, one Wood became lessee of certain office premises for a fixed term under a deed of lease. Wood sublet to the plaintiffs a part of the premises under an agreement to lease. The sublease incorporated the terms of the head lease which contained a covenant (Clause 10) conferring on the lessor in the event of destruction or damage by (*inter alia*) fire, an option either to determine the lease or reinstate the premises. The option was by the terms of the lease to be exercised by notice in writing to the lessee within fourteen days after the date of such destruction or damage. On the 5th February, 1928, the premises were so damaged by fire as to render them untenantable. No notice of the exercise of the option either to determine the lease or to reinstate was given within the time specified by Clause 10. On the 20th February, 1928, however, Wood served a notice on the plaintiffs intimating that the head lessor under the head lease *had elected to reinstate.* Wood subsequently assigned his interest under the lease to the defendants. The question arising was whether owing to the failure of the lessor to exercise the option within the time prescribed, the plaintiffs (the lessees) were entitled to treat the lease as determined.

A. H. Johnstone for plaintiffs.

Peak for defendants.

BLAIR, J., stated that it was admitted on behalf of the plaintiffs that at common law an absolute covenant in a lease to pay rent enures notwithstanding the destruction of the premises unless there be some provision in the lease mitigating this. That was clear—**Woodfall on Landlord and Tenant,** 21st Edn. p. 519.

It was submitted, however, on behalf of the plaintiffs that clause 10 meant that on damage to the premises by fire, there were two courses the landlord might take—he could either determine or reinstate—but that he must do one or the other, and if he did neither then the tenant was free to treat the lease as determined. It was further contended that the landlord had only an option and that he must exercise that option within the fourteen days mentioned in the lease, and if not properly *exercised within the fourteen days,* the landlord was disabled thereafter from exercising any rights under Clause 10.

The lease was entered into by business men, and it was important *at the outset to see whether it was possible to give business* efficacy to it. Prefacing Clauses 10 and 11 were the words: "And it is hereby covenanted and declared between the parties hereto as follows:" They clearly intended to create a covenant each with the other. They both should be taken to have been aware of the stringency of the common law rule already referred to, and it should accordingly be taken that Clauses 10 and 11 were intended to mitigate the stringency of that rule. The covenant provided that in the event of fire, etc., "the lessor may at its option (to be exercised by notice in writing to the lessees within fourteen days after the date of such destruction or damage) either" terminate or reinstate.

There was discussion during the argument as to whether the word "may" should be read as "must." But if the words "to be exercised," etc., were read as mandatory, as His Honour had no doubt was intended, then Clause 10 meant that the landlord covenanted that he would within fourteen days elect one way or the other. This construction did no violence to Clause 10

and gave it full and complete business efficacy. In His Honour's opinion it must be construed as part of the landlord's covenant that he would within fourteen days make his election of one of the two alternatives. His Honour pointed out that if this were not the construction absurdity would result, because the landlord by refusing to exercise his right of election would be able to say that as the lease was still subsisting and he had not elected to reinstate the tenant remained still liable at common law for the full rent. There were also other absurdities mentioned by Mr. Johnstone, in argument. His Honour, therefore, came to the conclusion that the landlord was bound within fourteen days after the fire to elect. It was admitted that he did not until the 15th day indicate what he was going to do. Even then he did not say what he was going to do, but he said what his superior landlord was going to do. That was a breach of covenant on the part of the landlord, but it was a trivial breach and His Honour doubted whether any damage could be proved as flowing from it. If the tenant has sustained damage by that breach he had his remedy.

If the tenant were not satisfied with the notice he had received as being sufficient he could notify the landlord that he, the landlord, had not made a proper election under the lease and call upon him to do so and fix a time within which if a proper election notice were not given he, the tenant, would treat such failure to notify election as a breach of covenant entitling him to determine the lease. His Honour did not see how it could be said that because the landlord had not properly elected the tenant was free to select whichever of the two alternatives he, the tenant, might choose to select. It seemed that the plaintiffs were bound to go that far in order to establish their claim that the lease was to be treated as determined.

The answer to the question asked in the originating summons was accordingly that the Agreement to Lease between the plaintiffs and Wood had not been determined by the default of Wood or the defendants to give the notice required by Clause 10 of the head lease.

Solicitors for plaintiffs: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for defendants: **Peak, Kirker and Newcombe,** Auckland.

Court of Arbitration.

Frazer, J. May 1; 7, 1928. Auckland.

BRESAND v. NORTHERN STEAMSHIP CO., LTD.

Workers Compensation—Accident Arising Out of and In the Course of the Employment—Painter Cleaning Hull of Ship Continuing at Work in Wet Clothes After Shower of Rain—Subsequently Working with Feet in Wet Sand and Mud—Muscular Rheumatism in Leg Caused Through Exposure While at Work—Whether an Accident—Whether Injury Due to Severity of Weather or to Special Risk Arising from Employment—Whether any Sudden or Unexpected Event.

A claim to recover from the defendant company compensation in respect of an injury by accident suffered by the plaintiff while in the employ of the defendant company.

The admitted facts were that the plaintiff, a painter, was employed on 6th December, 1927, by the defendant company in cleaning the hull of the s.s. "Rangitoto," in Calliope Dock, Devonport. About 8.30 or 9 a.m., a heavy shower of rain fell, and the plaintiff's clothing was wet through. The work was urgent, and the plaintiff continued working. Further rain fell during the day, so that for about five hours the plaintiff was working in his wet clothes. On 9th December, 1927, the plaintiff was employed in cleaning and painting the hull of the s.s. "Arapawa," another vessel belonging to the defendant company. The "Arapawa" had been beached at Onehunga, and the plaintiff had to work with his feet embedded in wet sand and mud. On the morning of 7th December the plaintiff found that he was suffering from pain in his left leg, but was able to work. The pain continued and by 12th December, the pain had become too severe to permit him to continue working. He consulted Dr. Gunn, who diagnosed his complaint as muscular rheumatism. The medical evidence established that the condition of muscular rheumatism was caused by the exposure of 6th December, and aggravated by the exposure of 9th December.

Fleming for plaintiff.
Cocker for defendant.

FRAZER, J., stated that the facts established that the plaintiff was incapacitated from working by reason of a condition that was due to exposure, and that the exposure occurred while he was working as an employee of the defendant company. The only matter remaining for consideration was whether those circumstances constituted an injury by accident arising out of and in the course of the plaintiff's employment.

Mr. Fleming, for the plaintiff, argued that an illness contracted in such a manner was an injury by accident. He cited **Morgan v. Owners of s.s. "Zenaida"** (1909) 25 T.L.R., 446; **Wilson v. Mervyn** 11 G.L.R., 427; **Andrew v. Failsworth Industrial Society, Ltd.** (1904), 2 K.B., 32; **Sheerin v. Clayton and Co.** (1910) 2 I.R. 105; **Barbeary v. Chugg,** 8 B.W.C.C. 37; **Ismay, Imrie and Co. v. Williamson** (1908) A.C. 437. His Honour pointed out that in all those cases the plaintiffs were awarded compensation, but the circumstances of each case disclosed something that was in the nature of an accident; that was—a sudden and unexpected happening—an unlooked-for mishap or untoward event. In **Morgan v. Owners of s.s. "Zenaida,"** a seaman, while painting the side of a ship lying off the Mexican coast, sustained sunstroke, which was held to be an injury by accident arising out of his employment, because he was in a position in which he was peculiarly exposed to the sun's heat reflected from the ship's side. In **Wilson v. Mervyn,** a farm-hand employed at snow-raking on a sheep-run in the high country, was frost-bitten, and the Court's decision in favour of the applicant was based on a finding that it was not a common occurrence for the cold, to which workers engaged in snow-raking were exposed, to produce gangrene; that it was an unlooked-for mishap, and was, therefore, in common language, a case of accidental injury. In **Andrew v. Failsworth Industrial Society, Ltd.,** a bricklayer was killed by being struck by lightning while working in an exposed position on an elevated scaffolding. In **Sheerin v. Clayton,** a man working in a mill-race up to his knees in water died from a sudden attack of uraemia and urinary poisoning, "caused by the sudden impact of the cold water." In **Barbeary v. Chugg,** a pilot, in jumping from a ship into his boat, jumped too far forward, and nearly upset his boat. He contracted sciatica as a result of the wetting he had received. In **Ismay, Imrie and Coy. v. Williamson,** a trimmer on a steamship died from heat-stroke while raking out ashes. Lord Loreburn said that the deceased, a man of poor physique, was killed by the heat-stroke coming "suddenly and unexpectedly" upon him. Viscount Finlay, commenting on this decision in **Dennis v. Midland Railway Coy.,** 14 B.W.C.C., 69, said that it must be regarded as resting upon the very special facts of the case. In all those cases, then, there was an accident, in the sense already referred to. Moreover, where the accidents were due to weather conditions, such as the excessive heat of the sun's rays, extreme cold, or lightning, there was superadded, by reason of the nature or particular locality of the employment, an abnormal risk of being injured: the worker who was injured was exposed to more than the ordinary risk of being affected injuriously by extreme heat or cold or by lightning, to which other persons working in the open air at that time and in that neighbourhood were exposed. His Honour also stated that in **Warner v. Couchman** (1911) 1 K.B. 351, with which **Wilson v. Mervyn** should be compared, Lord Loreburn quoted with approval the following passage from the judgment of Fletcher Moulton, L.J.: "It is true that when we deal with the effect of natural causes affecting a considerable area, we are entitled and bound to consider whether the accident arose out of the employment, or was merely a consequence of the severity of the weather, to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter, it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment."

In the case before the Court, His Honour concluded, the plaintiff was not exposed to any greater risk than any other person who was working in the rain, or than any other person who was working in a damp place. It was a risk that was shared by thousands of others, and a risk to which many people were frequently exposed. What happened to the plaintiff could not, by any stretch of the imagination, be described, in either the legal or the popular sense, as an injury by accident arising out of (i.e., casually related to) his employment. It might have happened to anybody, without regard to the nature or particular locality of his employment, who had a predisposition to rheumatism, and worked in wet clothes or in a wet place.

Judgment for defendant company.

Solicitors for plaintiff: **McVeagh and Fleming,** Auckland.
Solicitors for defendant: **Hesketh and Richmond,** Auckland.

The N.Z. Conveyancer.

Conducted by C. PALMER BROWN.

Consent of Husband to Partnership Contract of Wife under Section 29 of the Married Women's Property Act 1908.

I the husband of named in the within draft agreement do hereby consent to her entering into and carrying on the partnership contemplated by the said draft agreement (Provided always that the giving of this consent shall not in any manner render me liable for the debts liabilities or engagements of the said partnership or of the said wife).

DATED this day of
SIGNED Sealed and Delivered, etc.

NOTE.—Section 29 seems peculiar to New Zealand. No similar section appears in the English Acts nor is any similar provision noted in Burge's Colonial and Foreign Law. It is to be noted that the consent must be first obtained; it should therefore be endorsed on the draft or if endorsed on the agreement, given a prior date. It must also be under seal. It is apprehended that a partnership between a married woman and her husband with others is within the section.

The consent is to be filed in the office of the Land Registrar of the district in which the married woman resides (Subsection 2). This official is now known as the District Land Registrar. See Land Transfer Act 1870, Sections 2 and 3.

The effect of the section is obscure. A contract of partnership is governed by the same rules as to capacity of parties as any other contract (Jenks Dig. Civil Law, Bk. II, pt.2, par.598). With immaterial exceptions before the Married Women's Property Act 1885 and up to the passing of the Amendment Act of 1894 a married woman without separate estate having no capacity to contract could not have been a partner (Lindley, 9th Edn., p. 101). If, however, she had separate estate she had the necessary capacity and could make a contract binding on such separate estate and the consent of her husband was unnecessary (Dowling v. Maguire, 1 Ll. & G. 1) though in an action on the contract he was necessarily joined for conformity (Capel v. Powell, 17 C.B.N.S. 743). Since the passing of the Act of 1894 whether she has separate estate or not she is presumed to have separate estate and so has the necessary capacity and can be a partner. The Act of 1885 therefore did not alter the capacity of a married woman in this respect; but as Section 2 of the 1894 Amendment is now embodied in the Consolidation Act of 1908 and new legislation is thereby affected (per Edwards, J., in Minister of Customs v. McParland, 29 N.Z.L.R. 279) it would appear that Section 29 is intended to apply to married women without separate estate; but in view of the uncertainity of the matter the consent should be obtained in all cases.

In the only reported case (Fenwick v. Moore, 6 M.C.R. 172) it was held that the legislation was for the benefit of the husband and the wife could not take advantage of it. But the question is one of capacity; and incapacity is always a defence (Lindley, *loc. cit.*).

Guarantee to Secure Debentures.

THIS DEED made the day of BETWEEN A.B. and C.D. (hereinafter called "the guarantors") of the one part and X.Y.Z. (hereinafter called "the lender") of the other part WHEREAS the Company has issued a series of debentures charged upon its undertaking and property including its uncalled capital and goodwill each payable to bearer and each securing the principal sum of and interest as therein appearing AND WHEREAS the lender has contemporaneously herewith advanced to the Company the sum of and may advance to the Company further sums upon the security of the said debentures AND WHEREAS upon the treaty for the said advance it was agreed that the guarantors should guarantee in manner hereinafter appearing the payment to the lender of all principal moneys and interest intended to be secured to the lender by the said series of debentures NOW THIS DEED WITNESSETH that in pursuance of such agreement and in consideration of the premises the guarantors hereby jointly and severally guarantee to the lender his executors administrators and assigns the payment of all moneys for the time being due owing or payable by the Company to the lender under the provisions of the issue of the said series of debentures and the payment of all moneys which for the time being shall remain unpaid thereunder as and when the same shall become due and payable whether the same shall be recoverable by the lender from the Company by law or not.

PROVIDED ALWAYS and it is hereby agreed and declared that as between the guarantors and the lender the guarantors shall be considered for all purposes to be principal debtors for all moneys payable hereunder and shall not be released from this guarantee by any extension of time or other concession granted by the lender to the Company or by any variation in the provisions of the said debentures or any of them or any other matter or thing whereby the guarantors as sureties only would have been so released.

PROVIDED ALWAYS that the amount hereby guaranteed shall only be due and payable by each of the guarantors respectively to the lender at the expiration of 3 calendar months after notice requiring such payment shall have been delivered or sent through the post by registered letter by the lender to the one in question of the guarantors his executors or administrators at his or their usual address or the address last known to the lender.

IN WITNESS whereof this deed hath been executed the day and the year first above written.

A Point of Etiquette.

May counsel defending a prisoner on an indictment for murder properly remind the jury that the punishment, which will normally follow a verdict of guilty, is death?

There can be no doubt that such reminders have been uttered on innumerable occasions in the past, and even by counsel of such prestige and propriety as Sir Edward Clarke. But in **Rex v. Rust,** with the Lord Chief Justice presiding, Mr. Valetta, counsel for the defence, on five separate occasions brought to the jury's notice the usual punishment for murder and is said to have used words which Lord Hewart had himself used on another, though very different, occasion. The Lord Chief Justice administered a rebuke to Mr. Valetta for doing this "not once but five times," and observed that the jury's sole concern was with the verdict and not with its consequences; death might or might not ensue. But the Bar as a whole does not accept this view as is seen from the following resolution, which the Bar Council, invited to give a ruling, has published:

"The General Council of the Bar, having considered "the speech of Mr. Valetta in the case of 'Rust' "at the Central Criminal Court on the 1st February, "1928, is of opinion that Mr. Valetta was not guilty "of any breach of professional duty in his speech "for the defence."

Insurance Law.

The Principles of Insurance Law.
Part III.

(By H. F. Von Haast.)

Provision that Answers to be the Basis of the Contract.

(Continued.)

Other similar protective clauses are referred to in **Watt's Case.** Another protective clause runs something like this: "It is part of the contract that any person other than the insured who may have procured the insurance (whether such person be the authorised agent of the company or not) shall be deemed to be the agent of the insured named in the policy (and not of the company under any circumstances whatever) in any transaction relating to the insurance." If the words in brackets are left out (whether such person be the authorised agent of the company or not), the clause will not apply to the case where the person other than the assured is in fact the authorised agent of the company, and the clause is therefore of no particular benefit to the company. Probably it is best to rely on one of the protective clauses set out in Watt's case.

Prior to **Dawson's Ltd. v. Bonnin** (*sit. sup.*), in **Yorkshire Insurance Co. Ltd. v. Campbell** (1917) A.C. 218, the Judicial Committee of the Privy Council had to deal with a somewhat similar question under a marine policy. In a proposal for the insurance of a horse against marine risks and mortality during a voyage the horse was wrongly stated to be by Soult out of St. Paul mare. The horse died on the voyage. The proposal form contained a declaration by which the applicant warranted the truth of all the above statements and agreed that this declaration should be the basis of the contract between him and the insurance company. The Commonwealth Insurance Act 1909 provides that where the words used express an intention to warrant, they have effect as a condition which must be exactly complied with, whether material to the risk or not. It was argued that the pedigree of the horse was not in any way material to the risk and that therefore words "not bearing upon the risk" could not have been meant as a warranty but should be passed by in construing the policy. The Court held that the pedigree of the horse was capable of materially affecting the transaction and that in any case, since the parties imported the statement into their contract, presumably they thought it important. Hence the pedigree was held to be a warranty under the Act, and the owner of the horse went empty away. You will notice that our Marine Insurance Act 1908, like the Commonwealth Act, refers to a warranty, and, after defining it in Section 34, continues: "a warranty as above defined is a **condition** which must be exactly complied with, whether material to the risk or not." And Porter, in his "Laws of Insurance, 7th Edn., p. 148, says: "When it is agreed in any contract of insurance that a particular statement shall form the basis of the policy, the truth of that statement is **warranted.**" But, bearing in mind the now universally recognised distinction between a **condition** which goes to the root of the contract and the breach of which justifies a repudiation of the contract, and a **warranty,** or a subsidiary or collateral term of the contract, which gives merely a right of action for damages, I think you will agree with me that it is better to express the rule as it is given in the headnote to **Dawson's Limited v. Bonnin,** viz.: that the recital in the policy that the proposal should be the basis of the contract makes the truth of the statements contained in the proposal a **condition** of the liability of the insurers. You will then remember without difficulty that the incorrectness of a statement in such a case justifies the insurer in repudiating the contract, and not confuse the warranty, as the term is loosely used in insurance law, with the warranty as it is now used in connection with contracts generally. In consequence of the injustice done to the assured by these stipulations intended to safeguard insurance companies, legislation has been passed in America practically limiting the liability of the assured to make disclosure to the common law obligation. For instance, the Ontario Insurance Act provides in effect: (1) That no policy shall be avoided by reason merely of any misrepresentation of a fact unless it be material to the contract. This legislation might well be adopted in New Zealand. A Canadian case under this law is worth consideration as illustrating the difference between the position of the assured under the common law obligation and under the "basis of the contract" stipulation, and also as raising neatly the question of materiality. The case is **Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd.** (1925) App. Cas. 344, Mr. Schuch, the managing director of a munitions company, was kept busy at his work often from early morning until midnight, and was never for five years preceding the date of his policy once laid aside from work. But, feeling a bit run down at times he took a pick-me-up Zambelletis prescription. As he had a weak digestion, from time to time he received injections of it by a Dr. Fierheller. When he came to insure his life he was asked what illnesses, diseases or surgical operations he had had and said smallpox and trivial ailments. When asked to state every physician who had prescribed for him or whom he had consulted within five years preceding the date of the policy, he said "None." Now the first answer was held to be correct, but the second was inaccurate, and it was his duty to have disclosed Dr. Fierheller's name as that of a physician who had prescribed for him and treated him within the time specified. If the law of the land had permitted it and the assured's answers had been made a basic condition of the policy, as in the motor lorry case, then the inaccuracy of the answer would have invalidated the policy. But owing to the statute, the Court had to consider whether the fact concealed was material. It was argued that it was material even if the only result would have been that the company would have delayed consideration of the acceptance of the proposal until they had consulted Dr. Fierheller. But the Judicial Committee of the Privy Council held that the test was this: whether, if the matter concealed had been truly represented, it would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. As the company's medical examiner stated that, if he had known at the time all Dr. Fierheller deposed to in evidence, he would still have sent the case up with a recommendation for acceptance, the Court came to the conclusion that, had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium. Hence the company had to pay out.

Indemnity and Subrogation.

Turning to indemnity, including the principle of subrogation, the chief point is that all policies on property,

that is, fire and marine and burglary insurance, are contracts of indemnity against the loss insured against, but limited to the amount insured. What the assured can recover from the insurer is the direct loss that he has sustained from the fire, the shipwreck, or the burglary—the market value of the thing insured at the date of the event insured against if totally destroyed, and such damage as arises directly out of the event, such as damage done in the removal of furniture or by the fall of a wall injured by the fire, or by water used in putting it out. The assured cannot get indirect damage such as loss of business arising from the destruction of his shop; if he wants that, he must insure against loss of profits. And of course where the insurer elects to reinstate premises destroyed or damaged, he is entitled to the old materials left and will seek to reduce the amount of his indemnity by deducting their value. As the assured is entitled merely to be indemnified it follows that he is not allowed to make any profit out of his insurance. He cannot retain the moneys that he has received from the insurer and at the same time recover moneys from someone else, against whom he has a claim, making a total of more than he has lost. He must account to the insurance company for whatever he receives in excess of his loss, or the insurer, having paid the full amount of the loss (not merely the claim if the assured is under insured) is entitled to stand in the shoes of the assured so far as regards the recourse that the latter has against others. This is the doctrine of subrogation of which there have been some long and inclusive definitions: see, for example, per Lord Cairns in **Simpson v. Thompson,** 3 A.C. 279, 284. Suppose that an insurance company insures A's motor car against third party risks and that B, a driver of another car, negligently collides with it and damages it. The company on making good A's loss, is subrogated to A and entitled to sue B in A's name for the damage done to the car. This is subrogation in the case of a tort.

The first case of fire in which the doctrine was adopted was **North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.,** 5 Ch. D. 569. In that case Rodonachi & Co., corn merchants, had deposited grain in the warehouse of Barnett & Co., wharfingers, who were liable to make good to their customers loss by fire. The merchants as a further security insured their grain by "merchants' policies" in the North British and other offices and Barnett & Co. protected themselves by "wharfingers' policies" in the London, Liverpool and Globe and other offices. A fire destroyed a large quantity of grain in the warehouses, and the question arose whether the offices in which the wharfingers were insured were entitled to contribution from the offices in which the merchants were insured. Jessel, M.R., who tried the case, reasoned thus: "The insurance offices who granted the merchants' policies agreed merely to indemnify the merchants against loss by fire. But the merchants in case of fire had a right to look to the wharfingers to make it good, and the wharfingers were solvent, so that the merchants could and did recover the full loss from the wharfingers. Hence the merchants' insurance offices could say: 'You have made no loss, therefore you cannot call on us to pay you anything; or if you do, we in turn will be subrogated to you and can call on the wharfingers to pay us, who in their turn can claim payment from their insurance offices.'" Hence the insurance offices that had covered the wharfingers had to stand the whole loss.

The next important case is **Darrell v. Tibbitts,** 5 Q.B.D. 560. Mr. Forbes, the owner of a house, let it to Bonner, by a lease under which the lessee was liable to repair. Forbes insured the house in the Union Society by a policy which covered injury by gas explosion. A steam roller belonging to the Corporation of Brighton damaged a pipe, which caused an explosion of gas in the house and did considerable damage. Forbes sold the house and policy to Tibbitts to whom the Society paid £750, not knowing that under the lease the lessee was bound to make good injuries caused by an explosion of gas. The lessee received compensation from the corporation for the damage done by the explosion and with it reinstated the house. Then the Union Society claimed from Tibbitts the £750 that it had paid him and when he refused to refund, sued him in the name of the landlord and recovered, with the result that the loss was thrown back upon the corporation.

To grasp the significance of the next case, **Castellain v. Preston,** 11 Q.B.D. 380, one has to bear in mind that on the sale of a house insured by the vendor, the benefit of the insurance will not pass to the purchaser under the contract for the sale of the house unless expressly assigned to him and that the benefit of a policy of insurance against fire, is not, as a rule, assignable without the insurer's consent. There is, of course, a good reason for that. The company may be quite willing to indemnify A, the vendor, a respectable solvent citizen or his representatives, if he dies, but decline to have anything to do with B, the purchaser, who might be financially embarrassed and might have had fires before under suspicious circumstances. So a well-drawn contract for the sale of a house will generally contain a clause something like this: "The purchaser shall be entitled to the benefit the subsisting insurance upon the property against loss or damage by fire subject to the consent of the office and his paying a proper proportionate part of the premium for the unexpired period of the insurance, but without any liability on the part of the vendor to keep up or renew the same." Where there is no mention in the contract of the insurance, the vendor is still entitled, if the house is burnt down, to receive from the purchaser the full amount of the purchase money.

In 1880, Preston and others, who were trustees, agreed to sell to Rayner Brothers a house insured by the trustees in the London Liverpool and Globe Insurance Company for £3,100. After the date of the contract and before the date fixed for completion, the house was damaged by fire to the extent of £330, which the Company eventually paid to the trustees. The purchasers claimed that the vendors having sold them the house were trustees for them of the moneys received from the insurance company and ought either to reinstate the premises or make a corresponding reduction in the price. But the vendors, having successfully repelled this attack were emboldened to think that they could get the whole of their purchase money and also keep the insurance money, so the company sued them for the return of the £330, which it recovered on the principle that the contract of insurance was a contract of indemnity merely. The assured had received the full amount of their purchase money and had made no loss; the insurance company was entitled, therefore, to a refund of its £330.

(To be continued)

Forensic Fables.

THE SOUND LAWYER WHO MADE A GOOD RESOLUTION.

THERE was Once a Sound Lawyer at the Bar who was Firmly Resolved that if he should Ever Receive Judicial Honours he would Avoid the Errors and Failings of Some of his Predecessors. In particular he would not Indulge in Foolish Jokes, Give Vent to Irrelevant Observations about Men and Things, or Hint that the Bar had Sadly Deteriorated since he had Ceased to Adorn its Ranks. In Due Course the Sound Lawyer (Whose Brother-in-Law was a Personage of Some Importance) was Invited by the Authorities to Accept a County Court Judgeship. By Return of Post the Sound Lawyer Intimated that he was Ready and

Willing to Grapple With the Job. Grimly Determined to Adhere to his Good Resolution, he took his Seat on the Bench. Did he Adhere to his Good Resolution? Far from it. Before the Year was Out the Reporters in his Court had Recorded that a Plymouth Brother could not be Believed upon his Oath; that it was Common Knowledge that a Married Woman was either a Slave or a Tyrant; that while at the Bar the Sound Lawyer had Frequently been so Overworked that he had not been in Bed for a Week; that the Moral Standards of Artists and Literary Men were Extremely Low; that the Legislators of the Country were Obviously Half-Witted; and that Anybody who Read Boccacio could Understand why the Latin Races were so Greatly Inferior to the Inhabitants of These Islands. They had Also Taken Down a Variety of Time-honoured Jests Turning upon the Thrifty Habits of Scotchmen and the Irritating Ways of Mothers-in-Law. And the Sound Lawyer had so often Cited Apposite Extracts from the Works of Cicero, Ben Jonson, Rabelais, Tennyson and Other Authors, both Ancient and Modern, that in Order to Get them Down Correctly each of the Reporters had been Compelled to Purchase a Copy of the "Book of Quotations," in which the Sound Lawyer Discovered them.

Moral: Make Good Resolutions.

London Letter.

Temple, London,
28th March, 1928.

My dear N.Z.,—

We live in an amazing world and weather, nowadays: ten days ago it was so hot that one sat in one's garden and panted, and now it is so cold and there is so much snow about that one can hardly get warm at all! As, however, the Law is powerless to interfere, we must regard all this as irrelevant to our letters, frivolous as well as vexatious, embarrassing and fit to be struck out. And so to legal subjects.

I have heard diverse rumours as to the indisposition of the Lord Chancellor, Lord Cave, of whom you may do me the honour to remember I gave you a portrait at an early stage in these letters. It is said, from one side, that if he re-appears at all on the Woolsack, it will be for but the briefest period and to satisfy the pressing request that nothing should be done too hastily to deprive the Government, in its political needs, of that stalwart advocate, the Attorney-General. But here there is a divergence of view, for many say that Hogg will, as did Simon, refuse the Chancellorship when and if it be offered him. Hogg is an advocate without equal in the fashionable eye. In many ways he is, obviously, almost a stupid man and neither brilliant nor even brilliantly wise. That, however, is no harm in an advocate, whose art has frequently been said to require a large degree of "sane stupidity." Being thus in vogue, it may well be that he, even for the glorious distinction of the Woolsack, is not prepared, at his zenith, to close his advocate's career. It may be so, but I hope it is not. If this be true, he is a more stupid man than he is said to be, in that he must be refusing the top honour of the profession simply because he wants to grab in more money by private practice and more and more and more. I refuse to believe it of him; if he was anything out-of-the-way, as the history of advocacy goes, there might be some excuse for such a view, but he is not. If you dropped into a Court while he was arguing, you would hardly be attracted to stay and hear him out. He is just a sound, very learned, very impressive and solid King's Counsel, better than the mediocrities who are his peers in these days of a high level generally, but a poor degree of eminence in particular. To be Lord Chancellor would be a very great distinction for so average a man, and I shall remain convinced that he will have the modesty and moderation not to refuse it, if it be offered him.

As to cases of the period, **Smith Hogg and Co. v. Bamberger and Sons** was decided by Wright, J., a week or two ago, and dealt with the old controversy in shipping circles, when is a cargo "alongside"? It reviewed and renewed the principles laid down as to the test of being available for release from the ship's slings, if discharged by the ship's tackle, and, if discharged by hand, of being laid with one end on the quay and the other resting against the ship. The learned Judge dealt also with the effect of a custom of the trade, in this aspect, as to the discharge of timber cargoes. In the case of **Point Breeze,** Bateson, J., dealt with an attempt to arrest a ship, in connection with an accident from detention of which it had just been released by bail. I trust Bateson, J. dealt fairly and properly with this matter: I do not pretend to know the most elementary matters, even, of the law upon the subject of arresting ships. . . . .

In **Sloggett v. Sloggett** the President (our dear, old friend the President, who regarded your New Zealand appeals with such kindly solemnity and whose anxiety not to disgrace the judicial company in which he sat, at hearing them, is still fresh in my memory, though it is now becoming somewhat a matter of the past), in **Sloggett v. Sloggett,** I am saying, the President was called upon to pronounce as to the rights of the King's Proctor to intervene in divorce suits at a stage earlier than his usual, that is to say between decree *nisi* and decree absolute. Now, I know nothing about your divorce law and practice, and whether you have a decree *nisi* and a decree absolute and a King's Proctor to intervene and prevent the former becoming the latter ? I doubt if anyone else than our antiquated selves supports such an odd official ; and I, here, have ceased to be interested in his interventions, at whatever stage they take place. The new King's Proctor, succeeding my good friend Clive Lawrence, knows me little and briefs me less : would that I had been his nearest and dearest, to have held the Junior brief in **Sloggett v. Sloggett** and to sit comfortably, silently and at vast expense behind the Attorney-General while he argued the point. The King's Proctor may, it seems, intervene just when he darned well pleases : I trust for the sake of the brethren (from whose midst I have fallen) that the King's Proctor being so informed will not hesitate to avail himself of the extension of his business possibilities. I may add that in my own " matrimonial " case, that of the wife's solicitors suing the husband, in respect of their bill of costs in connection with an abortive divorce proceeding, was decided dead against me, and by my friend Mackinnon, J., too ! I think that, on an earlier occasion, I have given you an estimate of his abilities and selected him as my favourite Judge. Has he heard of this, by chance, and has it got to his head ? 'Twas a rotten judgment, and I should be going to the Court of Appeal about it, but that its own flaws make it a not unfavourable weapon in my client's hands, to bargain with in his negotiations to obtain a complete settlement of all differences. The gist of the Judge's decision is that, if a wife is warranted in suspecting and continuing to suspect her husband's infidelity, she may institute, prosecute, abandon and re-institute divorce proceedings, at his expense as to her costs, notwithstanding she has no evidence and (as her solicitors' letters advise) no hope of obtaining evidence wherewith to prove her suspicions to be well-founded. This carries **Abrahams v. Buckley** to a dangerous point, and somewhat tends to defy the Court of Appeal's restraining influence in **Durnford v. Baker** (see (1924) 1 and 2 K.B.).

And at this point I must mention a thrilling but theoretically secret subject, the battle between the Bar Council and the Lord Chief Justice, over the body of Counsel who :

(a) was publicly castigated by the chief in a judgment in a criminal appeal : and
(b) applied for help and protection to the Bar Council ; and, notwithstanding this,
(c) shall remain nameless so far as I am concerned.

The tussle, we all know, approaches its climax. What a matter for gossip !

The obviously inevitable has happened, that with the return of all the King's Bench Judges to London from circuit, we discover what a lot of common law Judges we have and how little we are prepared, with all our cases, to meet their sudden assembling in London to hear them forthwith. There is always, and, since man will never learn by experience, there always will be, this taking by surprise at the end of every law term ; but it is worse than ever, this time, for we now have our fullest possible complement of judges, but not our fullest possible number of effective causes for them to try.

I have an amusing utterance for report to you, which fell from Lord Justice Scrutton, on Monday, in the course of my addressing him. The parties, involved in the case in progress, have proceedings current also in Delaware, U.S.A., and in Scotland, making, with my English proceedings, a cosmopolitan litigation in all. " Have you not considered the possibility, Mr. Inner Templar," said Scrutton, L.J., " of consolidating all the actions and getting them transferred to the International Court at the Hague ? " He was in a very good mood, and Birkett, K.C., and Jowett, K.C., dealing with the same matter, had done nothing to ruffle him : indeed, it is marvellous to observe the incomparable tact with which these modern "stars " handle their tribunals. That is the *forte* of the day, and I doubt if the Bar of any other day had produced the equal of our contempory masters in this respect. On the other hand, there is no longer the " fight " of the older days ; and I am not sure, if I was a lay client, that I would not prefer to have my case fought to the last inch, than have m'Luds left agreeably disposed to everybody at the conclusion of the hearing.

In Income Tax matters there is an interesting, and encouraging decision as to " residence " in **Commissioners of Inland Revenue v. Lysaght,** reported in the current law journals, and another, on the same subject, but less pleasant to the taxpayers' palate, in **Levene v. Commissioners of Inland Revenue,** also reported *passim* and also decided in the House of Lords. . . . As I have no other decision, so supreme, to record, may I break off at this point to tell you of an amusing incident which did not happen, but would have been infinitely diverting if it had happened, as it came near to happening ? Civil servants are not allowed to issue election addresses or stand for election to the House of Commons : this restriction is imposed by Order-in-Council, which deals with " Servants of or paid by the Crown." Recently there has been a zealous and a jealous movement, similarly to curb the political activities of civil servants who are Peers and members of the non-electoral Chamber, the House of Lords. The Prime Minister's promise to act adumbrated a complementary Order-in-Council forbidding servants of the Crown, who are Peers of Parliament, from taking any part in debates, or voting. It would not do to attempt the end in view merely by forbidding them to become members of the House. To be a Peer is, for our purposes, to be a member of the House of Lords : manifestly it would be unconstitutional to forbid any Peers to take their places in their House : it could only be right to forbid them speaking or voting, so long as they hold office under the Crown. Exceptions are necessary, of course, corresponding to the exceptions made in the Order as to the Commons : e.g., the exemption from the restriction of persons holding political office. It seemed to be enough to reproduce, and merely to reproduce, this exception in the Order as to the House of Lords. But what about persons holding JUDICIAL office ? . . . At a late hour, apparently, it dawned upon our intelligence, as already it has dawned on yours, that, as every trial of an appeal to the House of Lords is a proceeding of the House of Lords, their Lordships,

after the enactment of this Order, must have adjudicated upon every appeal without either expressing their views or indicating their conclusions! What a magnificent preliminary point, for a desperate Respondent, was lost when there were inserted the words: ". . . . or judicial . . . ."

My young, new and not ill-looking "devil" informs me, in writing, that even an advertising slogan may be, it has been held in our fortnight, the subject of copyright law, the plagiarised epigram being, in the case in question, "A youthful appearance is a social necessity." I cannot read his reproduction of the name of the case, embodying this historic conclusion, but I mind not, for the conclusion seems to me very poor law: I mean the conclusion arrived at, not by Travers Humphreys, J., but by the slogan-writer! For, indeed, a youthful appearance may be a social necessity, but it is surely a professional misfortune of the first magnitude? However, I probably am writing all this merely to impress, or depress my "devil." . . . I next see that there is a decision as to the time when loans made for outdoor relief are payable: (**Guardians of the Union of Ashby v. Measham Colleries**: Divisional Court of the K.B.D.; L.C.J., Slater and Roche, JJ.); another as to an agent's authority to receive interest not extending to an authority to receive repayment of capital (**Bonham v. Maycock**: Roche, J.); and such a number of further cases, contained in the law reports of the London 'Times" daily newspaper, and of such interest, if hardly importance, as compels me to deal with them by that loathed method known as "legislation by reference." The "Times" then, be it said, of all the following dates has its particular appeal to the really earnest and meticulous student of the law:— March 11, 12, 17, 22, 27 and 28. There are, furthermore, two cases not there reported, to which my attention is called and yours should be: **France v. J. Coomes and Co.,** as to the limitations of the application of our **Trade Boards Act,** in cases where a workman is partly employed in an affected trade and partly employed at the same time in a trade not so affected. More importantly, the Court of Appeal (M. R., Sargant and Lawrence, L.JJ.) have upheld Russell, J., in his decision in **Crediton Gas Co. v. Crediton U.D.C.** of which I am almost sure I informed you at the time and which is, I see, now reported in the Law Reports (1927) I Ch. 174. It is a pity that I cannot be a little more reliable in my evidence as to whether I did mention the case or not. . . . ("I must have done." "I did not ask you, Sir, what you must have done, kindly inform us what you did?") . . . But my plaintive appeal to be allowed to read my own letters to you has so far fallen on deaf ears, and I am as much in the dark as ever as to what compromising things I may have written to you from time to time this last year or more, in the fulness of my heart! Their punishment for not showing them to me be upon their own heads: I will tell you what the case was about again, **and they shall have to read it twice. . . .** "The fact that a contract between two Corporations contains no provision as to its termination does not make it perpetual, even though both Corporations have perpetual succession. . . ." It doesn't indeed, as I keep on telling you. . . .

Yours ever, INNER TEMPLAR.

The semi-official announcement of Lord Cave's impending retirement from the Woolsack, and the "Daily Mail's" tip of Lord Sumner as his successor, reached me too late for comment in the body of this letter, as also did the news of the death of the eminent and famous solicitor, Sir Charles Russell, last night.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

The Jury System.

Legal practitioners are much indebted to the very able article by Mr. Harold Johnston herein, and for your excellent report of the proceedings at Christchurch.

The action of the Judges in altering, what one may call a constitutional part of our judicial system, calls for some explanation. The attempt in England to abolish jury trials has the disapprobation of many great Judges in England. In any case, it was really a war measure. In New Zealand, it has been a deliberate action on the part of the Judges, and not a mere matter of expediency.

I think that many practitioners, with common law experience, will agree that Mr. Johnston is quite correct in his contentions. It was one of the great benefits of our judicial system that laymen were closely associated with, and really formed part of the system.

It is a great danger to depart from a system that has been working well in the past, and, if by any chance, a partial judge occupied the Bench, it would do incalculable harm. Quite apart from this, is it not very questionable, whether at all stages of a Judge's life, he is and can remain a good judge of facts, when one remembers that the retiring age of Judges is seventy-two years, and in view of the life of isolation they seem compelled to live?

Anyone who casts aspersions on the jury system of to-day, entirely ignores the great advance there has been in education, and I think that there is no better system to decide a question of fact, whether under contract or in tort, particularly where there is hard swearing on both sides.

Yours truly,
J. F. W. DICKSON.

Auckland,
10th May, 1928.

The Editor,
"New Zealand Law Journal."

Sir,

Accountants and Charges for Solicitors' Audits.

In the latest issue of the "Accountants' Journal," April 20th, 1928, there appears a report of the proceedings at a general meeting of the Taranaki Branch of the New Zealand Society of Accountants, held at Stratford, in March last. The report states:—

> "The matter of solicitors' trust audits was discussed by "those present. It was generally admitted that the trust "fund itself should bear the cost of the audit, and that solici- "tors should not be called upon to pay such fee.
>
> "It was thought that if the Law Practitioners Act was so "amended as to permit of deposits of the trust fund being "made in the Post Office Savings Bank, the interest thus "earned would pay for the cost of the audit. The general "opinion was that this would be fair to practising solicitors.
>
> "It was therefore decided to ask the New Zealand Council "to take up the matter with the New Zealand Law Society, "in the direction of having some amendment of the Law Prac- "titioners Act made, so that the trust account itself could "bear the cost of the audit."

Sir, apart altogether from the fact that one's clients would hardly appreciate interest on their own monies going into their solicitor's pocket wherewith to pay his auditor, surely practitioners are themselves little likely to relish the constant waste of time involved in daily withdrawals in person from the Post Office Savings Bank—for it must be remembered (and it is difficult to see how an accountant, of all people, could overlook the fact) that the amount to the credit of a solicitor's trust account necessarily fluctuates daily and that a Post Office Savings Bank account cannot be operated upon by cheque.

Finally, how is the matter one that affects the accountants ? So long as their auditing charges are paid, how does it matter to them who pays them ?

" PRACTITIONER."

The Editor,
" N.Z. Law Journal."
Sir,

re Service by Post.

I have to thank you for permitting me to peruse a copy of the Minister of Justice's answer to my letter hereon. I need say very little in reply. Every practitioner in the Magistrates' Court knows that time is of the essence. By adopting one of the alternative modes of service laid down in the Act, it is possible to get a judgment in eight days from issue, but if in country districts one has to await the weekly, fortnightly, or monthly visit of a Magistrate, or make an application to him by agent in his home town for permission to serve otherwise than by post, in many cases it will not be worth while using the law at all. It will be noticed that the Clerk is not entitled to give permission for other than service by post and I prophesy that those registered letters marked " to be delivered to the addressee only " will be shunned as though stricken with plague. Already I have had this experience. I issued proceedings—they were posted; a few days later they were returned " unclaimed." Two days later the debtor came in and paid.

I may say that the Hawera Chamber of Commerce views the change with much disfavour.

Yours faithfully,
L. A. TAYLOR.

Hawera,
10th May, 1928.

Rules and Regulations.

Animal Protection and Game Act, 1921-22: Open season for the taking or killing of Opossums in various acclimatization Districts.—Gazette No. 43, 17th May, 1928.

Discharged Soldiers Settlement Act, 1915: Amended Regulations.—Gazette No. 43, 17th May, 1928.

Motor Omnibus Traffic Act, 1926: Regulations relating to the design, construction, and condition of Motor-omnibuses.—Gazette No. 43, 17th May, 1928.

Native Land Amendment and Native Land Claims Adjustment Act, 1923. Regulations as to the constitution of Board of Maori Ethnological Research and matters relating thereto.—Gazette No. 43, 17th May, 1928.

Native Land Amendment and Native Land Claims Adjustment Act, 1924: Regulations as to constitution of the Maori Purposes Fund Control Board and matters relating thereto.—Gazette No. 43, 17th May, 1928.

Land and Income Tax Act, 1923: Returns of Income derived during the year ended 31st March, 1928, to be furnished to the Commissioner of Taxes, Wellington, on or before the 1st June, 1928.—Gazette No. 43, 17th May, 1928.

Rules—Appeals to Privy Council.

(Continued from page 69)

Times within which set-down Petitions shall be heard.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down: Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof unless the Opponent consents to the Petition being put in the paper on an earlier day.

Notice to parties of day fixed for hearing Petition.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition, notify all parties concerned by Summons of the day so appointed.

Procedure where Petition is consented to or is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber; and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made, and of the date and nature of such Report or Order.

Withdrawal of Petition.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs; but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding Rule.

Procedure where hearing of Petition unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may, after notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions, for such directions as the Committee may think fit to give thereon.

Only one Counsel heard on a side in Petitions.

59. At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

Case.

Lodging a Case.

60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal: Provided that where a Respondent who has entered an Appearance does not desire to lodge a Case in the Appeal he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

Printing of Case.

61. The case may be printed either abroad or in England, and shall in either event be printed in accordance with the Rules I to III contained in Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed at least by one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his Appeal in person.

Number of prints to be lodged.

62. Each party shall lodge thirty prints of his Case.

Form of Case.

63. The Case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin. and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The Taxing Officer, in taxing the costs of the Appeal, shall, either of his own motion or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

Separate Cases by two or more Respondents.

64. Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same Appeal.

Notice of lodgment of Case.

65. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

Case Notice.

66. Subject as hereinafter provided, the party who lodges his Case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case, with a "Case Notice," requiring him to lodge his Case within one month from the date of the service of the said Case Notice, and informing him that in default of his so doing the Appeal will be set down for hearing *ex parte* as against him; and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default: Provided that no Case Notice shall be served until after the completion of the printing, or rearrangement under Rule 12, of the Record, and also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Setting down Appeal and exchanging Cases.

67. Subject to the provisions of Rule 43 and of the last preceding Rule, an Appeal shall be set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, &c.

Mode of binding Records, &c., for use of Judicial Committee.

68. As soon as an Appeal is set down the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases, to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half-leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record (if in more than one part, showing the separate parts by incuts, all parts being paged at the top of the page); (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also be shown on the back.

Time within which bound copies shall be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

Notice of day on or before which Appeals must be set down for ensuing Sittings.

70. The Registrar of the Privy Council shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for the ensuing Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business, and shall, subject to any directions from the Committee to the contrary, be heard in the order in which they are set down.

Notice to parties of day fixed for hearing Appeal.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

Only two Counsel heard on a side in Appeals.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

Nautical Assessors.

73. In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

Judgment.

Notice to parties of day fixed for delivery of Judgment.

74. Where the Judicial Committee, after hearing an Appeal decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the Judgment.

Costs.

Taxation of Costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C hereto.

What costs taxed in England.

76. The taxation of costs in England shall be limited to costs incurred in England.

Order to tax.

77. The Registrar of the Privy Council shall with all convenient speed, after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such Order to tax and Notice shall, not less than forty-eight hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

78. The Taxing Officer may, if he thinks fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

Appeal from decision of Taxing Officer.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

(To be concluded).

Arbitration Court Sittings.

The following fixtures have been arranged by the Court of Arbitration:—

Westport: Thursday, 21st June, at 10 a.m.
Blenheim: Thursday, 28th June, at 10 a.m.
Palmerston North: Tuesday, 3rd July, at 10 a.m.
Napier: Thursday, 5th July, at 10 a.m.
Wellington: Wednesday, 11th July, at 10 a.m.

Legal Literature.

"**History of the English Courts.**"
A. T. CARTER, C.B.E., K.C.
(Fifth Edition; pp. 183; Butterworth & Co. (Publishers) Ltd.).

The last edition of this book appeared in 1910, and thus seventeen years have elapsed between the fourth and fifth editions. The new edition is a very welcome asset to any library. As the writer says, his object in writing this book is not "*propagare fines*," but to give the average practitioner a good sound working knowledge of the history of the English Law Courts. It is next to impossible for the average lawyer with his practice to attend to, to read widely enough to keep in touch with research in legal history, and therefore, any book which can in succeeding editions summarise the knowledge which research has attained up to the time of each edition, is invaluable. The busy practitioner requires a book of moderate compass which takes stock accurately of the position, and is at the same time sufficiently interesting and entertaining for him to read in his leisure hours. There is no doubt that Carter, K.C., has produced a book which suits this purpose admirably.

The arrangement of the book is quite good. The first eight chapters follow each other in historical order as nearly as possible. The remainder of the chapters are as far as possible complete in themselves, and deal with such Courts as the House of Lords in its Appellate Jurisdiction, the Court of Admiralty, the Ecclesiastical Courts, and so on. In dealing with any particular Court, it is of course impossible to formulate a chapter which is entire in itself, because all the Courts to some extent grow from a common root, and it is therefore necessary to go back to the beginning and make cross-references in the case of any one particular Court. The history of the Courts is also bound up very closely with the history of the law, because the law in early times largely depended on the remedy. It was not a case of the law first, and then a remedy to enforce it, but it was a case of some Court providing remedies for certain actions, and through the remedy evolving the action. In entering, therefore, on the history of any Court, the remedy prescribed by the Court is to be taken into consideration, procedure has to be dealt with, and unless one wishes to construct a building without a roof, one can scarcely stop without at least some reference to the law which was developed in the various Courts. There are probably few people who have not heard of the Court of Star Chamber. There are fewer who really know much about it. As Bacon says: "The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, councillors, peers, prelates and chief judges." Jurisdiction in this Court was founded on consent as far as civil suits were concerned. Its criminal side did not use capital punishment. From the Court developed such portions of our law as perjury, forgery, fraud, libel and conspiracy. It developed the law of criminal "attempts." It did a great service to the young men of the country by formulating the offence for that some people "entangled young gentlemen in contracts of marriage to their utter ruin to which no statute exisieth." The Court is a most important one, and the reading of the chapter concerning it is perhaps of all the chapters one of the most interesting. Probably another matter which deeply concerns us in this country is the history of the Kings Council, which is well dealt with in chapter ten. The most important feature as far as we are concerned, deals with the Judicial Committee of the Privy Council, the ultimate Court of Appeal from the Colonies. It is not possible adequately to appreciate the section on the Judicial Committee of the Privy Council without reading the history of King's Council *in toto*. The history of the Coroner is also very interesting. He held inquests in case of treasure trove, royal fish, wrecks, and unexplained deaths. The forfeiture of property consequent on suicide rendered him a very useful member of the Kings Officials. It is somewhat surprising to read in chapter twenty-four the history of the place of the Jew in English law. Their history is very interesting, but the chapter comes to a somewhat abrupt ending. Perhaps in his next edition Carter will make this chapter a little more complete. It is rightly placed in this book.

The book's failings are only caused by the necessity for brevity. This should not perhaps be called a failing, more especially because many references are given enabling one interested more deeply in any particular topic to put his hand on the books which will assist him. If one desires one's brain to be something more than a mere storehouse of legal rules, and if one wishes to be interested in law for its own sake, it is quite essential to read such books as these, and nothing can be more certain than that the reader will feel stimulated by his brief excursion into the realms of legal history.

Scriveners.

"Scriveners are an extinct race," said Roche, J., in giving judgment in **Bonham v. Maycock** ("Times," 17th March), and that has long been known to be fact, notwithstanding that the name still figures among the City of London Livery Companies. Half bankers and half conveyancers, the business of the scriveners was, some 150 years ago, split up between these two occupations. The bankers seem to have taken over their share easily, but the solicitors did not win the conveyancing without a struggle. The litigation lasted for years. Mr. E. B. V. Christian has told the story of it in his "Solicitors" (pp. 124 *et seq*). Dr. Johnson brought fame to the dying profession by his praise of the literary qualities of "Jack Ellis, a money scrivener behind the Royal Exchange, with whom I at one period used to dine generally once a week." Boswell called him "the last of that profession called scriveners." To Campbell, who cited this in a note to his report of **Adamson v. Malkin** (3 Camp. 534), Johnson and his life were recent history. In **Bonham v. Maycock,** a solicitor had arranged a mortgage and had kept the deed. He received the interest and paid it over to the mortgagee, but ultimately he received the principal and did not pay it over. The mortgagee claimed it once again from the mortgagor's successor in title. An attempt was made to show that the solicitor had acted as a scrivener, and that he had implied authority to receive the money as agent for the mortgagee. But even a scrivener, it seems, could not receive mortgage money, since he could not reconvey the estate. At any rate a solicitor's implied authority to receive interest does not extend to the receipt of principal (**Wilkinson v. Candlish,** 5 Ex. 9), and Roche, J., held that the money must be paid once again.—"Law Journal."

Bench and Bar.

Mr. W. G. Riddell, S.M., has been appointed Chairman of the Licensing Committees for the Districts of Hutt and Wellington.

Mr. J. O. J. Malfroy, LL.M., of Wellington, who will complete his tenure of the New Zealand University's Travelling Scholarship in Law next month, has been awarded a fellowship in law at Columbia University—one of the fellowships offered under the New York Commonwealth Fund.

Mr. Eric H. J. Preston has commenced practice as a Solicitor at Invercargill.

Mr. St. Leger H. Reeves, of Eltham, has been admitted as a Barrister by His Honour Mr. Justice Reed, at New Plymouth.

The following admissions to the profession have been made at Wellington :—
Mr. M. R. Watterson (Barrister and Solicitor) and
Mr. H. S. King, Deputy Native Trustee (Solicitor).

The Wellington Law Students' Society.

The following case was argued before His Honour, Mr. Justice Ostler, on Friday, 27th April, 1928 : "On 1st January, 1927, John Jennings entered the service of Arthur Reeve, a dairyman, under a verbal agreement of that date which provided that the employment of Jennings might be determined by either party giving to the other one week's notice, and that Jennings should not, within three years, after quitting the service of Reeve carry on the business of a dairyman within a certain specified area. Jennings quitted the service of Reeve on March 31st, 1927, and within three years started a dairyman's business within the prohibited area. Arthur Reeve institutes a suit against John Jennings claiming an injunction.

(NOTE :—The above facts are taken from the case of **Reeve v. Jennings** (1910) 2 K.B. 522, from which case this trial is to be deemed an appeal.)"

C. E. Scott, for the appellant, submitted that the doctrine of part performance should be applied. The doctrine was not limited to cases where there was a remedy by way of specific performance but should be extended to all cases where a Court of Equity could grant a remedy. An injunction was asked for and the Court had jurisdiction. He cited **Lumley v. Wagner,** 1 De G.M. & G. 604 ; **McManus v. Cooke,** 35 Ch. D. 681, and **Fry on Specific Performance,** 6th Edn., 283.

Heyting, in support, submitted that the acts of part performance such as allowing the respondent into possession were exclusively referable to a contract of service of which the restraint clause was a term. **Maddison v. Alderson,** 8 A.C. 467, was distinguishable in that the promise in that case was merely an inducement for and not a term of the contract of service.

Powles, for the respondent, submitted that the doctrine of part performance was limited to contracts concerning land—**Brittain v. Rossiter,** 11 Q.B.D. 123 ; **Elliott v. Roberts,** 28 T.L.R. 436—and should not be extended. The remedy had always been restricted to cases where specific performance could be decreed.

Cahill, in support, argued the question of whether the contract was one coming within the Statute of Frauds, and submitted that it did. He cited **Hanau v. Ehrlich** (1912) A.C. 39 ; **McGregor v. McGregor,** 21 Q.B.D. 424.

His Honour Mr. Justice Ostler, delivering "judgment," said that the question whether the doctrine of part performance extended to a case such as the present was a difficult one which he did not feel called upon to decide because he did not consider the acts of part performance were sufficiently referable to the contract. In **Maddison v. Alderson** it was held that the acts of part performance must be exclusively referable to the contract alleged and the acts in the present case were not. The appellant, however, must succeed on another ground. The contract was not one coming within the Statute of Frauds. The rule was that if all that one party has to do was not intended to extend beyond a year then the contract was not within the Statute even though the performance was not expressly restricted within the year and might extend beyond the year—**Hanau v. Erlich.** The intention of the parties could only be gathered from the words of their contract :—"The employment might be determined by either party giving to the other one week's notice." Those words clearly showed that the contract was not intended to extend beyond a year and the contract was therefore not within the Statute of Frauds. The appeal must therefore be allowed.

His Honour said that he had nothing but praise for the manner in which "counsel" had presented their case. If he had been judging the trial as a debate he would have placed the counsel for the respondent first. His Honour then gave some advice to "counsel" which was greatly appreciated.

On the motion of Mr. C. H. Arndt a hearty vote of thanks to His Honour was carried by acclamation.

By—or Bye?

Lumley, Q.C., in his treatise on by-laws, spells the word "by-laws." The learned contributor to Halsbury deals with "bye-laws." Etymology ought to answer the question of which form is correct, and it appears that it pronounces in favour of "by-law."

Webster traces the prefix back to the Swedish and Danish "by" and Icelandic "baer" or "byr," meaning a township—from the root word "bua," to dwell. Hence a by-law is a law for a town as against a statute of the Realm. Another line of argument supports "by" as against "bye." The Old-English and Saxon "bi" closely cognate with German "bei" means "close to," "along with," and therefore, in a figurative sense, that which is incidental or subsidiary to or collateral with. This derivation justifies the use of by-law as a rule adopted by a corporation subordinate to its constitution. In reference to "bye," Webster says that it is obsolete except when used in the phrase by-the-bye ; but he gives no derivation of it and says that when used at all, it means a thing not directly aimed at. Dr. Funk, in his Standard Dictionary, says that the words may be used convertibly, but he gives no etymological history of either.

Rev. Thomas Davison, Editor of Chambers Dictionary, offers an illuminating note. He derives by-law from Icelandic brylaw, Danish by-lor and Scottish birlaw from the Icelandic bua, to dwell, and draws attention to the fact that "by" is a suffix to many place-names, for example, Enderby, Kirkby, Selby, and that the "by" in "by-law" is generally confused with the preposition. —"PRAEPOSITUS."

Indices.

A forerunner to the Index of the Forensic Fables was once referred to by Lord Chief Justice Whiteside. He told of a student who was entrusted with the dreary, but indispensable, task of compiling an index to some legal text-book. The following is a sample of his work, discharged in a spirit of serious endeavour :—

"Great Mind, *vide* Lord Ellenborough."
"Lord Ellenborough, p. 66."

On page 66 the reference was duly found :

"Lord Ellenborough said he had a great mind to "non-suit the plaintiff . . . ." —"Law Journal."