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"There is all the difference in the world between a Law being in force and a Law being enforced."
—*Lord Phillimore.*

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Minor Offences.

The Auckland Chamber of Commerce is reported in the Press to have debated as to whether trivial cases brought against motorists should not in future be dealt with in a more expeditious manner than at present obtains. It was stated that the enormous amount of time and money wasted in the issuing and delivering of summonses and in attendance at Court by motorists and policemen was an economical loss that seemed out of proportion to the seriousness of the offences. The remedy suggested was the introduction of the Continental system which was stated to consist in authority to traffic inspectors to collect on the spot the fines laid down and duly scheduled for various minor offences. Such criticism together with criticism that has been directed against some recent prosecutions under Shop-keeping Laws, which have led the "Evening Post" to ask whether the public was not allowing the law to be its master instead of its servant, will probably lead to some modification of the present cumbersome methods; but whether the Legislature will be prepared to go so far as to allow traffic inspectors to collect on the spot the prescribed penalties for minor offences is doubtful.

There is no need to believe that, if any change of method is advocated, Lawyers as a class will oppose a reform that appears to the lay citizen necessary. The Lawyer can have in such a matter no personal interest opposed to that of the lay citizen: he cannot be accused either of making money out of appearances on the trivial offences referred to, or of desiring to do so. The Lawyer who has by reason of his business relations with clients to appear for them and explain the circumstances concerning such trivial offences loses probably more in time and money than any other person concerned and undertakes such duty only because of the general relationship of solicitor and client existing between him and the offender. The Lawyer will, however, probably entertain doubts as to whether the system proposed will not lead to abuses and to questions of perhaps grave difficulty.

The imposition and collection of fines by traffic inspectors will render such inspectors liable to account to a higher authority for all fines imposed and received by them. A motorist will not always have in his or her possession the amount of the fine imposed and the question of subsequent collection will arise. Again, it seems that complete records would have to be kept so that those to whom the amount of the fine was of no consideration at all could not commit such trivial offences with impunity. If the invariable fine, for instance, for failing to have a rear light was five shillings, and a motorist could reckon on that penalty being imposed whether the offence was an isolated instance, or whether it was a continued disregard of the regulation in regard to rear lights, due to negligence or perverseness, the punishment would under such circumstances, in no way fit the offence. If, however, such a record is kept it does not appear how inspectors imposing and collecting a fine on the spot can consult it. If moral guilt is involved in the commission of even such minor offences as are under discussion, and the circumstances under which that particular offence is committed vary in each particular case, but the penalty is the same in all, then very rough justice, if justice at all, will be the result.

Professor Jenks has been taken to task for saying in his latest book that "The immense increase in modern law of petty police offences involving no serious moral guilt has altered profoundly the scope of the doctrine of *mens rea*, and has, indeed, given it quite a new meaning." To this view objection has been made on the ground that Professor Jenks is in fact allowing apparent exceptions to a principle of law to obscure the principle itself. The doctrine of *mens rea*, it is pointed out, is in fact intact: moral guilt is a relative thing. Every man is presumed to know the law and is presumed to be willing to obey it. If he willingly disobeys it, or is guilty of such negligence that he must be taken to have willingly disobeyed it, he has a vicious will so far as the State is concerned. Willingly to disobey the law involves, on the principle that once disobedience is exhibited there is no end to the slippery slope, serious moral guilt. In sharp distinction to Professor Jenks his critic says: "The full doctrine of *mens rea* is actually illustrated by petty police offences which Professor Jenks regards as involving no serious moral guilt." The critic then goes on: "One of the most disquieting moral signs of the present time is this tendency to defy the rule of law in small things. Not to carry proper lights on a bicycle is a moral offence, since in fact it has involved death on many occasions, as each rider knows full well. To drive on the wrong side of the road is a moral offence, since the driver knows that he may be imperilling many lives by the deed." Consideration then of the nature of these offences described as minor and trivial does seem necessary before a procedure relegating them to a category with a fixed punishment, and relieving the offender from appearance as a delinquent in a Court of Justice, should be adopted.

While the waste of time involved in the present system does seem disproportionate the complaint on this score should not stand as a rolled up plea. All who are detained at His Majesty's pleasure complain of the waste of time; but in trivial cases where the penalty is a fine the inconvenience is in most instances the only real punishment, the actual payment being no hardship at all and no deterrant. Although a complete answer to such theoretical objections as can be taken to regulated fines imposed and collected by traffic inspectors may be obtained from experience of the proposed system in other countries, we have not yet seen an authoritative statement of its operation and until we do we think it well that other methods of dealing with these offences should be examined. No doubt the Auckland Chamber of Commerce has this end in view when it proposed a conference with Mr. Hunt, S.M.

Court of Appeal.

Reed, J.
Adams, J.
MacGregor, J.
Blair, J.

September 27; October 12, 1928.
Wellington.

MAHER v. JOHNSON.

Practice—New Trial—Perjury—Action for Slander Alleging that Defendant had Imputed Theft to Plaintiff—Defendant Pleading Justification—Evidence of Admissions by Witness for Plaintiff After Trial that Certain Statements Made in Witness Box Untrue—Admissions Denied by Witness—Admissions Not Sufficient to Establish Perjury—Clear Proof Required—Not Sufficient Evidence of Theft to Support Plea of Justification Even if Perjury Established—Result of Trial Not Affected—Dangers Incidental to Granting of New Trial on Ground of Discovery of Fresh Evidence — New Trial Refused — Quaere Whether Necessary in Order to Establish Plea of Justification of a Libel Imputing a Criminal Offence to Prove Offence Strictly as on an Indictment.

Appeal from an order of Ostler, J., granting a new trial upon the ground that a witness had been guilty of such misconduct as to affect the result of the trial, inasmuch as he had committed perjury upon a material matter. The action was for slander in imputing to the plaintiff the theft of two heifers. Justification, *inter alia* was pleaded, including an allegation that the plaintiff had also stolen a bull. The driving of the heifers and the bull from a swamp, over which the plaintiff had grazing rights, to the plaintiff's farm, by an employee of the plaintiff, was common ground. The plaintiff alleged that those animals were strays and that his employee, Leslie Benge, in carrying out his instructions to bring in from the swamp to the farm any heifers near calving, accidentally included the two heifers; that shortly after their arrival upon the farm the plaintiff noticed them and gave instructions that they should be returned to the swamp with the next draft of cattle sent there, and that before this could be done they escaped from the farm and had disappeared. As regards the bull the plaintiff admitted he instructed the employee to bring it to the farm, and gave as his reason that it was detrimental to the other heifers on the swamp to leave it there. The bull was placed in one of the plaintiff's paddocks alongside the road, later it returned to the swamp, and was later impounded. In support of the plaintiff's case Benge and his brother Douglas Benge gave evidence. The latter was an employee, not of the plaintiff, but of the defendant, and without any instructions from the plaintiff was helping his brother. One, Denham, a witness for the defendant swore that the two heifers were removed from the swamp by the brothers Benge, and that there were no other cattle taken along with them. A verdict having been found for the plaintiff it was alleged that Douglas Benge made several statements conflicting with the evidence he had given in Court. The allegations were supported by affidavits of persons to whom the statements were made. The integrity of some of those witnesses was beyond question. Douglas Benge on affidavit denied the admissions attributed to him.

C. A. L. Treadwell for appellant.
Cousins for respondent.

REED, J., delivering the judgments of Reed, Adams, and MacGregor, JJ., said it was impossible to accept the statement of Douglas Benge denying the admissions attributed to him. The standing and character of some of the witnesses who deposed to his statements carried conviction of the truth. It was submitted on behalf of the defendant that it was proved by the admissions that Douglas Benge committed perjury in the witness box, and that this was misconduct on the part of a witness within the meaning of the rule. In support of that contention the case of **Garnaut v. Bennett**, 29 N.Z.L.R. 565, was cited. In that case Edwards, J., held that the evidence upon affidavit of several persons who deposed to an admission by a witness of having given false evidence at the trial was sufficient—in spite of the denial upon affidavit by the witness of having made such statements—to justify the conclusion that the witness had been guilty of misconduct at the trial, and he granted a new trial. With all respect it was difficult to understand the reasoning. Why should a statement made by a witness, after the trial, that what he stated in the witness box was untrue, be any more entitled to credit than his sworn evidence in the witness box? Why should a successful litigant be put to the risk and expense of a new trial because a witness, actuated possibly by ulterior motives, chose, after a trial, to go back on the evidence given by him in the witness box? If new trials were to be granted on the bare admission made by a witness that he gave false evidence in the trial, a most dangerous opening would be made for unscrupulous litigants. The witness risked nothing; if a new trial took place he had only to adhere to his original evidence in the witness box and either deny the statement attributed to him, or, what was perhaps safer, to admit that he had made the statement but that it was untrue. In **Hip Foong Hong v. H. Neotia and Co.**, (1918) A.C. 888, the Privy Council paid no attention on an application for a new trial, to the affidavit of a witness denying his evidence at the trial. Lord Buckmaster delivering the opinion of the Judicial Committee said (p. 893):—"The affidavit of the other witness cannot be trusted. A man who says one thing on oath at a trial and contradicts it by his bare oath subsequently on an affidavit cannot expect that much credence will be given to the latter assertion which proves that his former evidence was false." How much less then was a Court justified in acting upon a bare statement unsupported by oath, and indeed denied upon oath. In **Aliken v. Howell**, 1 N. & M. 191, two witnesses deposed upon affidavit that the principal witness at the trial had, since the trial, admitted to them that a certain bill of exchange had not been given in discharge of a gambling debt, whereas at the trial he had sworn it had been, which had resulted in a verdict for the defendant. Other persons made affidavits that it had not been given in discharge of a gambling debt. The witness denied the alleged admission and confirmed the evidence which he had given at the trial. The Court of Queens Bench, consisting of four Judges, refused an application for a new trial. In **Thurtell v. Beaumont**, 1 Bing. 339, and **Seeley v. Mayhew**, 4 Bing. 561, and **Hampshire v. Harris**, 3 Jur. 980, the Courts refused new trials even though true bills had been found by Grand Juries against the witnesses whose evidence was complained of. Those no doubt were old cases, but with the exception of **Garnaut v. Bennett** (*cit. sup.*) and **Hip Foong Hong's** case (*cit. sup.*) their Honour's were unaware of any modern decisions on the question. Those cases indicated how jealous the Courts were of granting new trials on the ground of alleged perjury by a witness unless that perjury were clearly established. It might be said that in the present case there was the evidence of Denholm, which if believed, proved perjury by Douglas Benge. No doubt that was so, but the jury had that evidence before them at the trial and also had the direction of the learned Judge that they might if they chose disregard the evidence of Douglas Benge whose general evidence was unsatisfactory and was not believed by His Honour. As opposed to Denholm the jury had the evidence of Leslie Benge. Douglas Benge was both before and at the time of the trial as well as when the statements were made, an employee of the defendant. He was also a nephew of the plaintiff. He was very averse to giving evidence in the case at all. It was only in cross-examination on behalf of the defendant that he gave the evidence that there were "about a dozen" cattle altogether taken off the swamp when the bull and heifers in question were removed. It was that very statement with regard to the number of cattle removed, elicited in cross-examination, that he had since stated to friends of the defendant was not true. It was not at all an unjustifiable inference that he wished to run with the hare and hunt with the hounds, and that, ignorant of the possible consequences, he thought that the case having been concluded he was at liberty to make any statements that might please his employer and enable him to retain his employ-

ment. For those reasons their Honours thought the information before the Court fell far short of what was required to establish that Douglas Benge committed perjury in the witness box, and therefore was insufficient to warrant the grant of a new trial.

There appeared to their Honours, however, to be a still more fatal objection. For the rule to apply it must sufficiently appear that the misconduct, if proved, affected the result of the trial. The particular evidence, which it was alleged was perjured, was relevant to only one issue, justification. If there was no sufficient evidence to warrant the Judge leaving to the jury the question as to whether the plaintiff stole the heifers—which the defendant said he did and endeavoured to justify the statement—then the misconduct alleged could not have affected the result of the trial. Their Honours reviewed at length the evidence as regards the theft of the heifers and cited the statement in **Gatley on Libel and Slander**, (659): "Where the libel charges the plaintiff with having committed a criminal offence, the defendant to succeed in his plea of justification must (it is submitted) prove the commission of the offence charged as strictly as if the plaintiff was being tried on indictment for it, i.e., beyond a reasonable doubt." The authorities were not, however, unanimous that such particularity of proof was required. The Full Court of South Australia in **Brown v. McGrath and Others**, (1920) S.A.S.R. 97, examined the English cases up to that date with the result that the learned Judges felt bound by an admittedly obiter dictum of the Privy Council in **Doe d. Devine v. Wilson**, 10 Moore P.C. 502, combined with the decision of the House of Lords in **Cooper v. Slade**, 6 H.L.C. 746, to hold that a jury in a civil case where the commission of a crime by a party to the proceedings was in issue, might decide that issue on the balance of probabilities, and it was held that a direction to the jury by the Judge in the Court below that it was their duty "to be satisfied that the crime is as fully substantiated in this case as would warrant you finding the plaintiff guilty of the particular crime if he were upon his trial" was a misdirection, and a new trial was ordered. To arrive at that conclusion the Court, of necessity, had to hold that Park, J., misdirected the jury in **Thurtell v. Beaumont**, 1 Bing. 339, although his direction was unanimously approved by the Court of Common Pleas. The text writers were, their Honours stated, divided in opinion; **Taylor on Evidence** (11th Ed.) 116, and **Stephens on Evidence** (9th Ed.) 108, were of opinion that criminal charges arising in civil proceedings must be proved with the same strictness as a charge upon indictment. **Phipson on Evidence** (6th Ed.) 10, came to the conclusion that the weight of opinion was contra, the reasons for the criminal rule being inapplicable in civil cases. It was unnecessary to decide the question in the present case for it was clear that, even applying the test of preponderance of evidence, there was no evidence upon which a jury could reasonably find that the plaintiff had been guilty of theft. Therefore, even upon the assumption that Douglas Benge was guilty of misconduct as a witness, it had not been shown that the result of the trial was affected.

Counsel for the defendant further submitted that Ostler, J., ought to have granted a new trial upon the ground either (1) that material evidence had been discovered since the trial, or (2) that the verdict was against the weight of evidence. The learned Judge refused an order upon those grounds and their Honours saw no reason to differ from his opinion. As regards the latter ground there was direct evidence of slander, which the jury were entitled to believe, and the plea of justification failed. As regards the former the affidavits filed disclosed that in the event of a new trial new and irreconcilable evidence would be called on both sides. The mischief was obvious. See **Orbell v. Mossman** (1927) G.L.R. 161. Their Honours were therefore of opinion that a new trial should not be granted.

Blair, J., dissented.

Appeal allowed.

Solicitors for appellant: **Treadwell and Sons**, Wellington
Solicitors for respondent: **C. H. Hain**, Wellington.

Adams, J.
Ostler, J.
Blair, J.

October 2, 3, 4; 12, 1928.
Wellington.

JOHN BURNS & CO., LTD. v. s.s. CANADIAN EXPLORER.

Shipping—Bill of Lading—Wire—Corrosion on Voyage—Liability of Shipowners for Damage—Whether Damage Due to "Rust" within Exception in Bill of Lading—Onus of Proof—Insufficient Evidence of Negligence.

Appeal from a judgment of MacGregor, J., reported *ante* p. 169, where the facts are sufficiently stated. The learned Judge held (1) that the respondents had proved *prima facie* that the damage complained of came within the excepted risk of rust; (2) that appellant company had not discharged the onus of proof which was thereby shifted on to it of proving that the rust was caused by any negligence on the part of respondents or their servants, and gave judgment for respondents.

Richmond for appellant.

Rogerson for respondents.

OSTLER, J., delivering the judgment of the Court said that the first contention of Counsel for the appellant was that the damage to the wire was not "damage consequent upon rust" within the meaning of the exception in the bill of lading. Their Honours were satisfied, however, that respondents proved in the Court below, at least *prima facie* that the damage was within the exception of rust. The appellant in the first place did not seek to do more than to prove that the wire was shipped in good condition and that when landed it was damaged by rust. It reserved its evidence as to the cause of the damage until respondents had given evidence in answer to its *prima facie* case. It thus threw the onus on to the respondents of proving that the damage came within the exception. The respondents then put in the bill of lading. In the opinion of their Honours that alone would have been sufficient together with the evidence called by the appellant to have established a *prima facie* case that the damage complained of was within the exception of rust. If the respondents had merely put in the bill of lading, and no further evidence had been called on either side, then it was clear that the duty of the Court would have been either to nonsuit the appellant or to give judgment against it: see **Mills and Co. v. Shaw Savill and Albion**, 10 N.Z.L.R. 153. Their Honours agreed with the argument in so far as to say that the exception of "rust" must refer only to rust caused by atmospheric corrosion, but they did not agree that the onus rested on the ship to prove that rust was caused by atmospheric corrosion to bring itself *prima facie* within the exception of rust. If that contention was sound, then a ship relying on the exception of "breakage" would have to prove not only the breakage, but would have to exclude the possibility of such breakage being due to the ship's negligence. That was entirely contrary to the well established rule laid down in **The Glendarroch**, (1894) P. 226, that once the damage was apparently within the exception the onus was shifted to the owner of the goods to take the case out of the exception. But the respondents went further than merely to put in the bill of lading. They called evidence to prove that the wire was of the poorest quality; that the zinc covering was so thin as barely to cover the naked steel; that the amount of zinc was no more than one-third of an ounce to the square foot; that the coating was so thin that it was impossible to prevent the wire from rusting if it got wet; and that when shipped in the depth of the Canadian winter, at a very low temperature, it was impossible to prevent moist sea air subsequently travelling down the ventilators and condensing its moisture,

which contained sea salt, on the cold surface of the wire. It was claimed that that was the cause of the rust. That was the evidence of Mr. Page, a scientist of repute, called by respondents. Their Honours thought therefore that the judgment in the Court below was right in holding that at the close of respondents' evidence they had brought themselves at least *prima facie* within the exception of rust, and that by that evidence the onus was shifted back on to appellant company to prove circumstances taking the damage out of the exception. The appellant seemed to have accepted that view for it then proceeded to call evidence in an endeavour to prove that the rust was not caused by condensation of moisture from sea air.

The principal witness for the appellant was Professor Worley, whose evidence the Court reviewed at length. That was the only evidence called to rebut the *prima facie* case made by respondents and was that the damage was caused by salts of sea water. It was true that it was stated that an excess of calcium sulphate was found, but there was no evidence whatever that calcium sulphate would cause rust either alone or in combination with sea water or sea salts. Their Honours upon considering the evidence in that connection thought that the presence of an excess of calcium sulphate might be ignored as having really no bearing on the matter. The fact that it was found among the products of corrosion was no proof whatever either that it caused or contributed towards causing corrosion, or even that it was present when the corrosion took place. There remained the evidence that the damage was done by sea salts. It was well known to Professor Worley and his Counsel that where damage had been caused to Canadian wire shipped in winter on former occasions, that damage had been caused by the sea salts carried in the moist atmosphere of the Gulf Stream, which moisture condensed when it came in contact with the cold wire in the hold, and deposited the salts in solution on the wire. It seemed to have been common ground in the case that sea water contained fifty times as much salt as condensed moisture from sea air, and consequently it was contended by appellant company that seeing that as much salt was found on the three strands of wire examined by Professor Worley as would be contained in twenty drops of water, it would require a 1,000 drops of sea moisture, or about half a cupful to deposit the amount of salt found in the analysis. It was claimed that half a cupful of water could not hang on to a foot of wire and evaporate from it, leaving the salts behind; that if there were successive condensations with the variations of temperature the water hanging to such foot of wire would be washed away with its salt content still in solution, and therefore the only conclusion was that the damage was not caused by sea moisture. The appellant therefore claimed that by such proof it had discharged the onus which had been shifted to it proving facts consistent with negligence on the part of respondents or their servants, and therefore, in the absence of further explanation by the ship it was entitled to judgment. It relied on the following passage in **Scrutton on Charter-parties**, 12th edition, 275, as correctly stating the law:—"If, when loss or damage has occurred, the goods owner proves facts as to the cause of the loss which are consistent with negligence on the part of the shipowner or his servants, but such evidence leaves it in doubt whether the actual cause of the loss or damage was such negligence, the onus is upon the shipowner to prove that the loss was not due to negligence." Counsel for the respondents claimed that that was not an accurate statement of the law, and was not borne out by the authorities. He claimed that it was only where the owner proved facts consistent with negligence, but that through some omission or negligence of the ship it was left in doubt whether the loss was due to its negligence, that the onus shifted to the ship. It was true that in **Travers v. Cooper**, (1915) 1 K.B. 73, that seemed to have been the ground of the decision. But that case did not contain a complete statement of the law. The leading case of **Czech v. General Steam Navigation Co.**, L.R. 3 C.P. 14, was really an illustration of the rule. The passage quoted had been accepted as a true statement of the law in **s.s. "Essex" v. Mason Struthers and Co.**, (1922) G.L.R. 471, in **Leighton v. General Steam Navigation Co.**, 130 L.T. 662, 666, and in the judgment of the Court below. It was merely an application of the principle which ran through the law applicable to all civil cases, viz., that they must be decided upon the balance of the probabilities. If the owner proved facts consistent with the ship's negligence he thereby rendered it probable that that was the cause of the damage, and thus shifted the onus. In their Honours' opinion the passage quoted was a correct statement of the law.

The question remained whether the appellant company had proved facts consistent with the negligence of the ship. In the opinion of the Court it had failed to do so. The evidence was, in their Honours' opinion not sufficient to prove that, while the wire was in the ship, sea water (as sea water and not as sea moisture) was allowed to come into contact with it. The evidence went no further than to show that from the fact of the finding of a larger proportion of sea salts than he had previously found, Professor Worley was confirmed in his original assumptions that sea water had come into contact with the wire. It had not only not been proved, but it had been disproved, by the evidence relied on that the damage could have been caused by commercial salts in solution. A suggestion that the salt solution might have come from hardwood dunnage which might have been used on a previous voyage in the storage of salted hides carried by the ship was proved by the evidence relied on to have been without foundation. Professor Worley said that the composition of the salt used on hides was not the same as that found in sea water. In fact the only contention that Counsel for appellant company could put forward legitimately on the evidence of Professor Worley was the contention which he felt constrained to abandon at the opening of his case, viz., that the damage was done by sea water. That contention was abandoned because of the strength of the evidence taken on commission that no sea water could have got into the hold. It was common ground that sea salt could have reached the wire through condensation of sea moisture. In their Honours' opinion, in view of the evidence that no sea water got into the hold, the experiments conducted by Professor Worley were not extensive enough to exclude the more probable explanation that, in spite of the quantity of sea salt found, it was due to the condensation and subsequent evaporation of sea moisture. It might well be that there would be successive condensations, and sufficient moisture might be condensed to cause water to drip from the top coils on the lower ones. The coils had been roughly sprayed with oil by the manufacturers just before shipping, which seemed to have been an innovation, and also implied an admission by the manufacturers that the coating of zinc was not sufficient in itself to protect the wire from rust during the voyage. It might well be that the closeness with which the wire was wound and the presence of the oil would cause the lower portions of at least some coils, which were stowed at an angle, to retain half a cupful of water, which would drip from coils higher up on the pile. That quantity of water on evaporation would leave as much sea salt as was found by Professor Worley. Their Honours thought that was much the most probable explanation of the excess of sea salts found, and the Court was confirmed in that opinion by the fact that Mr. Page, an expert as highly qualified as Professor Worley, was of opinion that was the best explanation of the damage in sight. Their Honours therefore thought that the judgment of the learned Judge in the Court below was right in holding that the respondents having proved *prima facie* that the damage came within the exception of rust, the appellant did not discharge the onus of proof which then shifted to it of proving that either the damage was not within the exception, or that the ship had been guilty of negligence.

Appeal dismissed.

Solicitors for appellant: **Buddle, Richmond, and Buddle**, Auckland.

Solicitors for respondents: **Nicholson, Gribbin, Rogerson and Nicholson**, Auckland.

Supreme Court.

Reed, J. November 7; 12, 1928.
Wellington.

IN RE RATHBONE (DECEASED).

Administration—Executor—Commission—Extra Remuneration Allowed to Executors on Account of Work Involved in Distribution of Half-share Residue Bequeathed to Charities—No Jurisdiction to Order that such Extra Remuneration be Charged Against Share Bequeathed to Charities—Administration Act, 1908, Section 20.

Motion under the Administration Act, 1908, for an order adopting and confirming the Registrar's report as to the remuneration that should be paid to the executors in the estate of one Lissie Rathbone, deceased. The estate was of the approximate value of £260,000. By the terms of the will the residue was to be equally divided between the children of the testatrix on the one hand, and charities, to be selected by the executors, on the other. The Registrar had in his report directed that considering the volume of work done with regard to the distribution to charities an extra remuneration of 1% (£880 15s. 0d.) on the amount so distributed should be allowed to the executors. The question raised was whether the Court had jurisdiction to make an order as contended by counsel for the children of the deceased, directing that such extra allowance should be a special charge against the share bequeathed to charities.

Sir John Findlay, K.C. and Wiren for children.

Myers, K.C. and Kennedy for executors.

Taylor for the Attorney-General.

REED, J., said that the statutory authority under which the Court acted was Section 20 of the Administration Act, 1908. That section did not create a new jurisdiction; it only provided a more summary procedure for the exercise of a jurisdiction that was always inherent in a Court of Chancery, and which was still inherent in the Supreme Court—**Warnock v. Jones,** (1925) G.L.R. 189; **Nissen v. Grunden** (1912) C.L.R. 297, 307. The difficulty was whether or not the remuneration allowed by the Court to an executor could be ordered to be paid out of a particular bequest. Section 20 did not give the power; the words "the assets of a deceased person" meant the general assets available for the payment of administration expenses of which any allowance made to an executor was a part—**Williams on Executors,** 11th Edn. 763. The testatrix bequeathed one half of the residue of her estate to charities. Until all the administration expenses were paid it was impossible to arrive at the amount of the residue—see per Jessel, M.R., in **Trethewy v. Helyar,** 4 Ch. D. 53, 56. To hold that there was power to charge that half of the residue with an administration expense would be to override the expressed intention of the testatrix, just as much as if an order were made charging a specific devise with the payment of an executor's remuneration. Sir John Findlay had cited **Forster v. Ridley,** 4 De G. J. & S. 452, in support of his contention that the Court had jurisdiction to make an order of the nature sought, but that case, as His Honour read it, was against that contention. The remuneration in that case was granted on account of the special services rendered by the executors in carrying on a farm, part of the estate of the testator, but the order was for payment out of the testator's personal estate. Counsel had not been able to cite any case in which the remuneration to an executor had been made payable out of a specific bequest on account of its benefiting by the work of the executors. His Honour did not think, therefore, that there was any jurisdiction to order that the £880 15s. 0d. be paid out of the share bequeathed to charities.

Registrar's report adopted and confirmed.

Solicitors for executors: **Luke and Kennedy,** Wellington, agents for **Lee, Mackie, Harker and McKay,** Waipawa.

Solicitors for children: **Findlay, Hoggard, Cousins and Wright,** Wellington.

Solicitors for Attorney-General: **Crown Law Office.**

MacGregor, J. October 16; 20, 1928.
Wellington.

DEALY v WELLINGTON CITY CORPORATION.

Municipal Corporation—Power to Take Land for Street Widening Purposes—Land Taken must be bona-fide "Required" for Street Widening Purposes—No Power to Take Land Not Abutting on Street for Purpose of Recouping Adjoining Owner Whose Lands Compulsorily Taken—Construction of Statute so as to Prevent Undue Interference with Private Rights—Municipal Corporations Act, 1920, Section 192—Wellington City Empowering and Amendment Act, 1927, Section 5.

Motion for an injunction to restrain the defendant Corporation from compulsorily taking a small strip of freehold land belonging to the plaintiff. The defendant Corporation had given notice to the plaintiff under the Public Works Act, 1908, of its intention to take from him the strip of land in question, ostensibly for the purpose of widening Thorndon Quay. The plaintiff's land however, did not front or abut on Thorndon Quay, but immediately in front of plaintiff's land there was a section of land belonging to one Khouri, which had a frontage to Thorndon Quay, and separated plaintiff's land from that street. By the same notice the defendant Corporation had also given notice of its intention to take the whole of Khouri's property, which apparently was taken in two pieces (1) the strip actually fronting Thorndon Quay, and (2) the back portion (immediately in front of plaintiff's property). The front strip of land taken from Khouri corresponded precisely in area with the strip of land taken from the plaintiff, and it was admitted by the defendant that it took the strip of land in question from the plaintiff in order to be able to hand it over to Khouri in exchange for the front strip taken from him for widening the street, so that his land in future might correspond in area with his entire original section fronting Thorndon Quay, thus largely reducing any compensation payable to Khouri for his land.

C.A.L. Treadwell for plaintiff.

O'Shea for defendant Corporation.

MACGREGOR, J., said that it was contended on behalf of the defendant Corporation that the necessary statutory authority for its action was to be found in Section 192 of the Municipal Corporations Act, 1920, and more especially in Section 5 of the Wellington City Empowering and Amendment Act, 1927. His Honour read the relevant portions of those sections. Both of those sections had evidently been enacted with the same object in view, i.e., to give the Corporation adequate powers of acquiring land for the purpose of constructing a new street or widening an existing street. By Section 192 that power was given in general terms which were obviously very wide, but by Section 5 the same power of taking land was to some extent defined and made more specific. It was clear, however, that in either event the power of taking land for street-widening must be exercised "for the purpose of" widening the street in question, or "in order to" widen an existing street. In other words, no such taking of land could be justified by the statutes referred to, unless it were taken either "for the purpose of" widening a street or "in order to" widen a street. Could it then with truth be said of the plaintiff's strip of land in the present case that it was taken by the defendant Corporation for either of those purposes? In considering that question it was necessary to keep in mind the words used by Earl Loreburn in **Marquess of Clanricarde v. Congested District Board for Ireland,** 79 J.P. 481, to the effect that when an administrative body was authorised by statute to take land compulsorily for specified purposes, the Court would interfere if it used those powers for different purposes. In the present case the local body had proposed to take for street widening purposes three pieces of land (1) the narrow strip fronting Thorndon Quay owned by Khouri, (2) the back or remaining portion of Khouri's section, and (3) the narrow strip of the plaintiff's land behind Khouri's section corresponding in area with the front strip acquired from Khouri himself. The immediate question was whether the third strip of land was in point of fact acquired "for the purpose of" widening Thorndon Quay? Somewhat similar questions had from time to time arisen in England. The cases on the subject were conveniently summed up in **6 Halsbury,** 21 *et seq.*, where it was laid down (p. 21) that the promoters of an undertaking could not take or interfere with any particular piece of land unless it were clear from their special act that they were authorised to do so. His Honour quoted the statement at p. 25 dealing with "land taken for recoupment and exchange" where the effect of the cases dealing with the precise question involved

n the present case was summarised. In the present case the defendant Corporation claimed broadly that under its local act of 1927 (Section 5) it was empowered for the purpose of "recoupment" or otherwise to take "any land to any depth on either or both of the sides" of Thorndon Quay, whether or not such land was required for street-widening purposes. His Honour thought that such a bold claim was not justified by the language of Section 5. It certainly went beyond the terms of the statutory notice of intention to take the very land in question given by the Corporation itself. It appeared to His Honour that the taking of the whole of Khouri's land might be justified by the terms of the notice, but not the taking of the plaintiff's land at the back thereof. That particular piece of land was not in fact "required to be taken" for the purposes of street widening. It was in truth "required to be taken" for the sole purpose of "recoupment." His Honour did not think such a taking could be justified either under the general Act of 1920, or under the local Act of 1927. In the case of Khouri's land the front strip was taken as being the land actually "required" to widen Thorndon Quay, and "together with" it was taken further back, land of greater depth but forming part of the same property. That second piece of land taken from Khouri presumably would come within the terms of Section 192 (1) of the Act of 1920, and might in whole or part be disposed of subsequently as a "surplus area" under Section 192 (2). His Honour was, however, unable to see how the plaintiff's land could be said in reason to be required "for the purpose of" widening Thorndon Quay, in the whole circumstances of the present case. Having arrived at that conclusion on the facts, it appeared to His Honour that he should, if possible, so construe the relevant statutes as to prevent undue interference with the rights of private property-owners in a city—see **Gard v. The Commissioners of Sewers of the City of London,** 28 Ch. D. 486, per Baggallay, L.J. (p. 506) and Bowen, L.J. (p. 511).

Injunction granted restraining the defendant Corporation from taking the plaintiff's land.

Solicitors for plaintiff: **Treadwell & Sons,** Wellington.

Solicitor for defendant: **City Solicitor,** Wellington.

Smith, J. October 15; 20, 1928. Auckland.

DE RENZY v. CLAXTON.

Mining—Application for Mining Privileges—Priority—Application for Special Claim Not Entitled to Priority over Earlier Application for Prospecting License—Applications Filed in Respect of Same Subjectmatter—Mining Act, 1926, Sections 73 (g, (h), (l), 169 (c).

Appeal from decision of the Warden's Court at Thames. The respondent filed an application for a prospecting license on 2nd September, 1927. The appellant on 19th September, 1927, lodged an application for a special quartz license and also filed an objection to the respondent's application. On 29th September, 1927, the respondent filed an objection to the appellant's application. Both sets of applications and objections were heard at the Warden's Court, on 19th October, 1927. The Warden held that there were before him two applications filed in respect of the same subject-matter within the meaning of Section 169 (c) of the Mining Act, 1926, and that the respondent, being the prior applicant, had the superior right. He therefore granted the application of the respondent and dismissed that of the appellant.

Hogben and Fotheringham for appellant.

Clendon for respondent.

SMITH, J., said that the object of Section 169 (c) was to give priority to the person who first marked out in the prescribed manner the mining privilege for which he applied of whatever kind it might be. That object was by the terms of Section 169 (c) subject to the specific provisions elsewhere contained in the Act with respect to specific applications. There was no provision in the Act which required that an application for a special claim should have priority over an application for a prospecting license by virtue of the superior quality of a special claim as a mining privilege. His Honour thought, therefore, that the words "two or more applications filed in respect of the same subject-matter" in Section 169 (c) meant two or more applications for a mining privilege, of whatever kind each or any of them might be, in respect of the same land, and if they overlapped as to a portion of the land only, then in respect of that portion. His Honour thought that such construction was also borne out as regards prospecting warrants and ordinary prospecting licenses by the provisions for the grant of a fresh prospecting warrant or a fresh ordinary prospecting license upon the expiry of the previous warrant or license—Section 73 (g) and (h). Under those provisions the applicant, complying with the conditions of Subsection (h) had, in His Honour's opinion, under Subsection (h) priority over all other applications for mining privileges, including prospecting licenses and claims. Having obtained a new license by virtue of the priority conferred by those provisions, he was then entitled under Section 73 (l) to priority in obtaining any other mining privilege, including a special claim, in priority to any other person in respect of the land to which his prospecting license related, subject, however, to such conditions as were prescribed. One of those conditions was contained in Rule 14 of the Regulations under the Mining Act, 1926, under which he must either take up any mining privilege (including a special claim) applied for by some other person, or risk the loss of his prospecting license Sections 73 (g) and (h) showed, in His Honour's opinion, that the holder of a fresh prospecting license was entitled, if he so wished, to maintain his priority against other applicants for any class of mining privilege. It would be strange if Section 169 (c) were to be construed in such a way as to destroy rights of priority in respect of an original application. So long as priority of application obtained the applicant ought to have the opportunity of showing that he could comply with the conditions just as the applicant for a new license in succession to an old license might retain his priority upon complying with the formalities prescribed by Section 73 (h) (i) and (ii), and upon showing that he had complied with the conditions of his previous license—Section 73 (h) (iii). Moreover, by Section 169 (f), every application retained its priority until such application was granted or refused or withdrawn. There being no specific provisions in the Act giving applications for special claims priority over applications for prospecting licenses when both come before the Warden for determination, His Honour thought that Section 169 (c) applied and that the Warden was bound to determine priority of application in favour of the respondent. His Honour thought that Rule 14 by its terms contemplated the application for some mining privilege in respect of land comprised in an existing prospecting license. The application must, His Honour thought, be made after the prospecting license had an existence. The Magistrate was right in dismissing the appellant's application. The appellant had his remedy under Section 73 (l) and Rule 14.

Appeal dismissed.

Solicitors for the appellant: **Fotheringham and Wily,** Auckland, agents for **A. G. Bryan,** Thames.

Solicitors for the respondent: **Clendon and Vollemaere,** Thames

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Smith, J. September 14; October 6, 1928. Wellington.

IN RE WHITMORE (DECEASED), BLACK v. JAMES.

Administration—Administration Bond—Assignment for Breach of Condition—Principles Upon Which Court Exercises Discretion—Whether Breach *prima facie* Established—Applicant a Solicitor who had Obtained Judgment Against Administrators for Costs Incurred by the Estate Since Death of Deceased—Whether Applicant a Proper Person to Whom Bond should be Assigned—Former Suspension of Solicitor Not a Valid Objection—Possibility of Interest Being Adverse to Duty—Assignment Refused—Administration Act, 1908, Sections 21, 24.

Summons calling upon the administrators of the estate of G. S. T. Whitmore, deceased, and the National Insurance Company of New Zealand Limited as surety upon the administration bonds given by such administrators to show cause why the administration bonds should not be assigned by the Registrar to the plaintiff as trustee for all persons interested on account of breach of the conditions of the bonds. G. S. T. Whitmore died on 3rd November, 1920, leaving a will disposing of his property, but omitting the appointment of an executor. The deceased died a widower and left him surviving four children. His property consisted almost entirely of interests in land in the Gisborne District and the stock running thereon. He, however, assumed erronously in his will that he was the owner of a farm in South Africa. He specifically devised his land to his children and grandchildren by name. On 30th August, 1921, a motion that letters of administration with the will annexed be granted to the defendants James and Fish was filed

in the Supreme Court. The plaintiff, then a solicitor practising in Auckland, acted as solicitor in connection with the application. As the application was opposed the Court ordered that the question of the right to letters of administration be tried by action. Letters of administration with the will annexed were eventually granted to the applicants on 27th June, 1922. Each administrator and the National Insurance Company of New Zealand Ltd., as surety, then gave a bond in the usual form in the sum of £5,000. Little was, however, done to advance the administration of the estate. No inventory had been filed even on 5th December, 1922. The stamp accounts were not declared until October, 1924, and were filed in December of that year. The real and personal estate was declared at £4,975, and after deduction of debts a balance of £2,045 was shown. Although the estate was in July, 1925, assessed for duty, the duty was not paid, and the letters of administration were not uplifted from the Stamp Office. The sums collected by the administrators on behalf of the estate since the testator's death did not exceed £300. The reasons given by the administrators for the delay was that the position of the estate was involved; that the greater portion consisted of undivided interests in blocks of native land only one title being held by the deceased in his own name absolutely; and that exhaustive enquiries were necessary in South Africa to ascertain whether the deceased possessed any interest in property there. They also claimed that they had no liquid funds to enable them to uplift the letters of administration, to make enquiries and to get in the assets. A petition filed by certain beneficiaries for the removal of the administrators and for the appointment in their stead of the Public Trustee was refused by Reed, J., on 12th December, 1927. The plaintiff had recently obtained judgment by default against the estate for the sum of £257 for law costs incurred by the estate when he acted as solicitor, and applied as a creditor of the estate for assignment of the administration bond.

Perry for summons.

Macassey to oppose.

SMITH, J., said that the bond given pursuant to Section 21 of the Administration Act, 1908, was conditioned for duly collecting, getting-in, and administering the estate of the deceased. It was conditioned upon: (1) exhibiting a true and perfect inventory of all the estate, effects, and credits of the deceased which should come into the possession of the administrators or any person by his order or for his use on or before 27th September, 1922; (2) well and truly administering the same according to law, and (3) rendering to the Court a true and just account of the administratorship on or before 27th June, 1923. If the Court was satisfied that the condition of the bond had been broken, it could, pursuant to Section 24 of the Act order the Registrar to assign the same to some person to be named in the order; and such person might thereupon sue as if the same had been originally given to him, and could recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the bond. Those provisions corresponded with Sections 81 and 83 of the Court of Probate Act, 1857 (England).

The general principle upon which the Court acted was stated in **In the Goods of Young,** L.R. 1 P. & D. 186. The Court had a discretion in assigning the bond; it had to exercise that discretion by ordering the assignment of the bond if (1) the application was made *bona fide*, (2) a *prima facie* case of breach was made out, and (3) the applicant was the proper person to whom the bond should be assigned–see 14 **Halsbury,** 209, par. 465. There were other qualifications as to the discretion. If the application was clearly frivolous and vexatious the Court would not assign the bond—**Baker v. Marshmann and Brooks.** 3 Sw. & T. 32. Furthermore, a Court of Equity would not in general order the bond to be assigned upon the mere non-delivery of an inventory—**Crowley and Sharman v. Chipp and Tubb,** 1 Curt. 458. His Honour saw no reason to doubt that the application was made by the plaintiff in good faith. The application was clearly not frivolous and vexatious. As to the question of breach of the conditions of the bond the Court had to be satisfied at the present stage only that a *prima facie* case of breach was made out—see **In the Goods of Young** (*cit. sup.*). The Statute did not require that the substantial question—as to whether there had or had not been a breach of the bond—should be tried on the present application. That question must be determined in any action brought by the assignee of the bond, if it was assigned to him against the administrator. It was clear that there had been a breach of the bond in failing to file the inventory on or before 27th September, 1922. On the authority of **Crowley and Sharman v. Chipp and Tubb** (*cit. sup.*) His Honour held that, if that were the only breach, the bond ought not to be assigned. The ordinary remedy for such a breach was to take proceedings in a summary way to compel performance of the duty. See **Tiffin v. Tiffin** (1916) N.Z.L.R. 656. If the only breach were a failure to file accounts, His Honour thought that a similar procedure ought to be followed. It would certainly be difficult to ascertain what amount was recoverable by reason of the mere failure to file the inventory and the accounts within the respective periods for so doing. His Honour thought it necessary to consider, therefore, whether a *prima facie* case had been made out that the estate had not been well and truly administered according to law. In His Honour's opinion, such a *prima facie* case had been made out. The administrators had been under a positive duty to administer the estate. Disregarding the personalty, there remained the freehold and leasehold interests. Those came to the hands of the administrators immediately upon the grant of the letters of administration and their title related back to the death of the deceased—Section 4 of the Administration Act, 1908. The real estate was assets in the hands of the administrators for payment of duties and all debts, and for such purposes the administrators might have sold, leased or mortgaged the real estate—Section 5. The administrators said that they had tried to mortgage the estate in order to pay the duties and the debts. They said that they had been unable to do so by reason of the nature of the real estate, and that by reason thereof the Government revenue departments and other creditors had withheld from pressing their claims. The administrators said in effect that the titles were in a difficult position, and that they could not without the expenditure of funds which they had, so far, been unable to raise on the security of the estate, ascertain what was the present position, or collect any rentals now owing, or relet the lands, or even sell them. Now the whole of the real estate was specifically devised. The deceased directed by his will that his debts should be paid out of his other property and stock. As the administrators claimed that that property was insufficient for the purpose, then the specifically devised or bequeathed estates were liable to make good the deficiency, in the proportion that the value of each of those estates bore to the aggregate value of the specifically devised or bequeathed estates of the testator—Section 16. The administrators had the right to sell any of the specifically devised estates for the payment of the debts. One of those estates was held by the deceased in his own right absolutely, though subject to a lien for costs. That did not prevent it from being sold or offered for sale, subject to payment of the costs. Moreover, it was not, in general, a difficult matter to offer undivided interests of this kind in Native land for sale to the Crown. No action of that kind had been taken or even attempted. For the purpose of the Death Duties Act, 1921, they declared the real property to be of the value of £3,919 8s. 0d. During the last 6 years they had contented themselves with trying to raise money on the security of the land. They had failed to realise any part of the estate and pay the debts under the powers vested in them. In His Honour's opinion that was sufficient to justify him in holding that there had been, *prima facie*, a breach of the obligation well and faithfully to administer the estate.

It was strongly urged by Mr. Macassey, however, that the applicant was not the proper person to whom the bond should be assigned on the grounds: (1) that the plaintiff was not a creditor of the deceased at the time of his death; (2) that by reason of the plaintiff's suspension from practice as a solicitor, the plaintiff was not a proper person to be entrusted with the assignemt of the bond as trustee for the other persons interested.

With respect to the first ground, the true question was whether the applicant was entitled to the benefit of the proper administration of the estate. In His Honour's opinion the applicant was so entitled. The bond was to be construed so as to carry out the objects of the Statute—per Lord Esher in **Dobbs v. Brain,** (1892) 2 Q.B. 207, 212, and the bond was therefore to be construed as conditioned for duly collecting, getting-in, and administering the estate of the deceased. It was part of the due administration of the estate of the deceased that the administrators should pay the law costs incurred by them in the process of administration. That view was made clear in the form of bond settled by the Judge of the Probate Court in England, pursuant to Section 81 of the Court of Probate Act 1857 (England) which section, although it related only to personal estate, corresponded in its wording with Section 21 of the Administration Act, 1908. That form of bond was set out in **Dobbs v. Brain** (*cit. sup.*). Furthermore, it was ordered by the Supreme Court on the grant of administration that the costs of the administrators, which were the costs they had then incurred to the present plaintiff, should be paid out of the estate of the deceased. His Honour held, therefore, that the plaintiff was interested in the due administration of the estate by the administrators, and that he was entitled, on that ground, to make the present application. As to the objection to the plaintiff personally, His Honour was of opinion that as the plaintiff's suspension from practice had ceased to operate, and that he was now an officer of the Court and fully entitled to practice as a

solicitor, His Honour was not justified in saying that on this ground the plaintiff ought not to be entrusted with the assignment of the bond. Nevertheless His Honour was of opinion that the bond ought not to be assigned to the plaintiff. He was the solicitor for the administrators for approximately two years after the death of the deceased and had charge of the application for administration. It was clear that if the plaintiff were granted the assignment of the bond in trust for all persons interested, he might be placed in a position in which there would be temptation to overlook or not to press matters which should have been investigated while he acted as solicitor to the defendant administrators, both before and after the grant of letters of administration to them. His Honour thought the plaintiff should not be put in a position in which his personal interest might conflict with his duty as a trustee, and accordingly held that the bond ought not to be assigned to him.

Application dismissed.

Solicitors for summons: **Mason and Mason,** Auckland.
Solicitor to oppose: **A. Hanna,** Auckland.

Smith, J. October 17; November 3, 1928. Auckland.

REEFMAN v. REEFMAN.

Destitute Persons—Guardianship Order—Jurisdiction of Supreme Court to Vary Guardianship Order Made by Magistrate under the Act—Destitute Persons Act, 1910, Section 18 (3).

Originating summons issued by the plaintiff, Henry Reefman, to vary a guardianship order made on 8th August, 1927, under the Destitute Persons Act, 1910, by the Stipendiary Magistrate at Auckland, on a complaint made by the plaintiff's wife. The Magistrate had at the same time made a separation order in favour of the wife, but on making the guardianship order had declined to make an order giving the plaintiff access to the children. On the present application the defendant's objection was that the Supreme Court had no jurisdiction to vary an order of guardianship made by a Magistrate under the Destitute Persons Act 1910.

Hall-Skelton for plaintiff.
Matthews for defendant.

SMITH, J., said that the effect of the order of guardianship made by the Magistrate was set out in Section 18 (3) of the Act. Its effect was to confer upon the mother, "while it remains in force," the custody of the children, and she was to have "the same powers, rights, duties and liabilities as if she had been appointed their guardian by the Supreme Court." The Section contemplated that the order of guardianship might cease to remain in force. It could only be cancelled, pursuant to the Destitute Persons Act, either by the Magistrate upon a rehearing granted under Section 38 of the Act, or by the Supreme Court on appeal, pursuant to the power in that behalf contained in Section 77 of the Act. The Magistrate was given no power to cancel or vary the order as was the case with a separation order—Section 21; a maintenance order—Sections 39 and 50; an attachment order—Section 43 (8); a charging order—Section 44 (3); and a receiving order—Section 54 (2). A guardianship order had the same finality under the Destitute Persons Act as an affiliation order. His Honour was of opinion, however, that the Act merely gave the Magistrate the power to appoint a guardian. When appointed, that guardian had the same rights, powers and liabilities as if appointed by the Supreme Court. It followed in his opinion that such a guardian might be controlled by the Supreme Court. Section 18 (3) did not specify any particular mode of appointment by the Supreme Court. The Supreme Court might appoint a guardian in certain cases under the Infants Act, 1908; but its inherent jurisdiction was saved by that Act—**In re Stuart-Forbes,** 27 N.Z.L.R. 458. His Honour thought the true view was that the Supreme Court had, in respect of a guardian appointed by the Magistrate under the Destitute Persons Act, all the powers which it could exercise, however they were derived, in respect of a guardian appointed by itself, whether pursuant to its inherent jurisdiction or otherwise. The Supreme Court might entertain an application by a father in respect of access to his children when he had been completely deprived of their guardianship by the Supreme Court—**Mikkelsen v. Mikkelsen,** 34 N.Z.L.R. 555. It followed that the Court had jurisdiction to entertain the present application by the father for access.

Solicitors for plaintiff: **Hall, Skelton and Skelton,** Auckland.
Solicitors for defendant: **Matthews and Clarke** Auckland.

The Honourable Mr. Justice Smith.

His Honour Mr. Justice Smith is a son of the Rev. J. Gibson Smith, and was born at Dunedin, in 1888. He was educated at the Invercargill High School, Wellington College, and at Victoria University College, where he took the degree of LL.M., in 1913. While at the University he took a prominent part in the affairs of the Debating Society winning the Plunket Medal for Oratory, in 1909. He commenced his legal career in 1907, in the office of Sir John Findlay, K.C., with which firm he remained until 1910 when he entered into partnership with Mr. D. M. Findlay. In 1913 Mr. Smith entered into partnership with the late Mr. C. B. Morison, K.C., an association which continued until the latter's death in 1920. In 1922 he admitted Mr. D. G. B. Morison into partnership, the firm practising under the style of Morison, Smith & Morison. He was in 1915 and 1916 and again this year a member of the Council of the Wellington District Law Society. On the 26th April, 1928, he was appointed to the Supreme Court Bench.

While at the Bar, Mr. Justice Smith was a man of many interests; he was Vice-President and Chairman of the Executive of the Returned Soldiers' Association, 1921-24; a member of the Executive of the New Zealand Alliance, 1921-22; President of the Wellington Rotary Club, 1927. In his youth he was a keen sportsman representing his University in tennis and athletics, and his province in hockey.

Careless Drafting.

The protests against careless and slovenly drafting of Statutes are steadily growing in volume. There have, however, been only a few constructive suggestions as to how this admitted evil can be remedied. Now in *Roe v. Russell* (1928) 2 K.B. 117, Scrutton, L.J. has recommended a bold step which, if taken, will undoubtedly have a salutary effect. "I regret I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts, and the Members of the Legislature who passed them, and are responsible for the obscurity of the Acts, and their failure clearly to provide for such obvious incidents of tenancy, as death with or without a will, bankruptcy, power to assign, and power to sublet in whole or in part demised premises." If this suggestion is accepted we might then go a step further and adopt the valuable practice followed by the Locrians as set out in Gibbon's Decline and Fall of the Roman Empire (Vol. IV, p. 447, Bury's Edn.): "A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and, if the law was rejected, the innovator was instantly strangled." It is probable that if these two provisions were incorporated in our law there would be less hasty and ill-considered legislation.—"Law Quarterly Review."

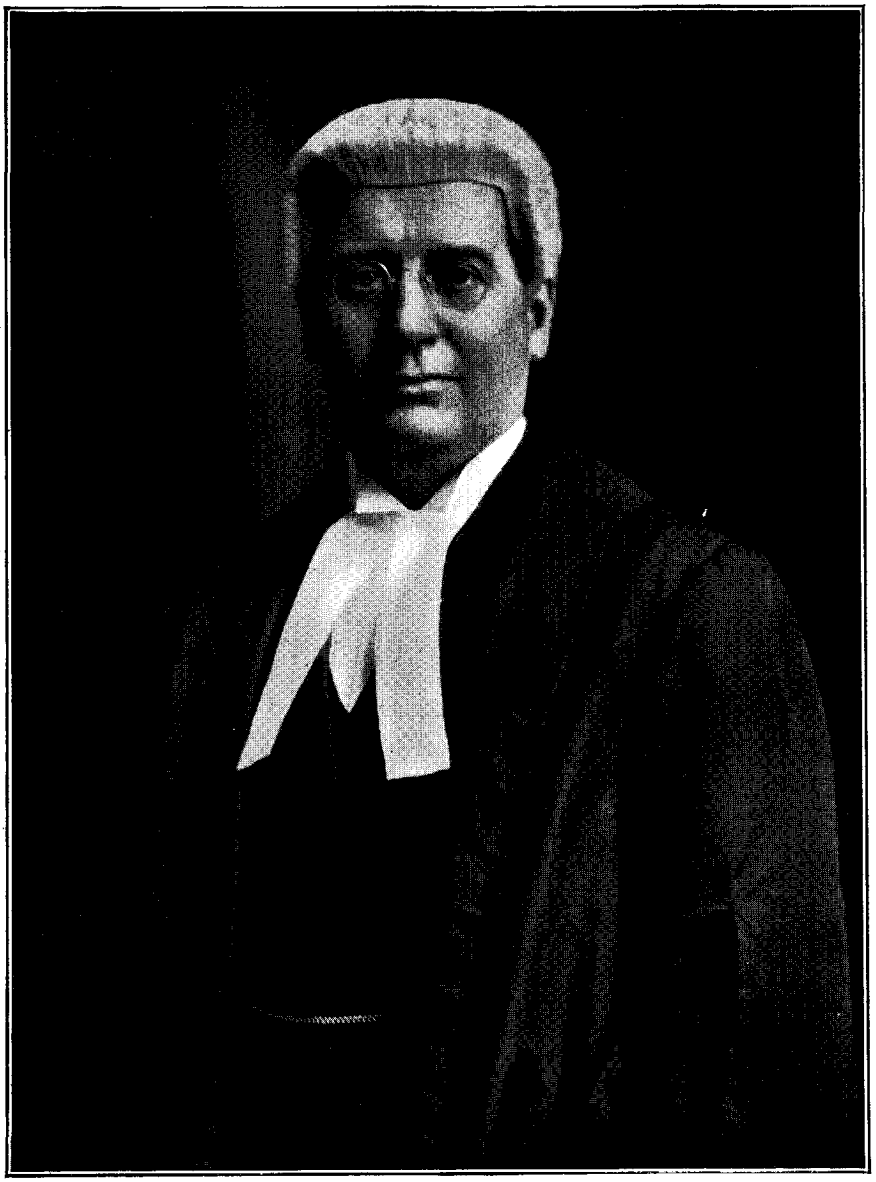

Photo by S. P. Andrew

The Honourable David Stanley Smith,
Judge of the Supreme Court of New Zealand

The Doctrine of "Caveat Emptor."

Its Application to the Sale of Goods.

By C. H. Weston, LL.B.

In view of recent decisions it may be of interest to enquire what has happened to that hard old Tory "*Caveat Emptor.*" Is he still alive, or with the advance of Liberalism in the nineteenth century did he fold his arms and turn his face to the wall? If he is no longer with us, his successor in the field of goods and chattels is the principle embodied in the exceptions to Section 16 of our Sale of Goods Act, 1908. The section reads as follows:—

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(d) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

With the vendor who sells an article knowing it to be defective the law has no sympathy, but when he sells it with a latent defect of which both he and the buyer are ignorant, who is to suffer? Apparently the tide of decisions has set in favour of the buyer, who, upon the discovery of the defect that was latent at the time of his purchase, may rely on the conditions set out in Subsections (a) and (b).

The latter subsection has dealt most severely with the doctrine of *caveat emptor*. By Section 2 of the Act "quality" includes state or condition. If the vendor's business causes him to deal in goods of the description concerned then he impliedly undertakes that they shall be of "merchantable quality" which means, according to the late Sir John Salmond, that they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market: *Taylor v. Combined Buyers Ltd.* (1924) N.Z.L.R. 627, at p. 645. For practical purposes it means that the vendor under such circumstances is responsible for the consequences of latent defects of which he may have been completely ignorant and for which he may be in no way to blame, as it makes no difference if he is not the manufacturer of the goods. The decisions now make a formidable list, of which the following may be cited:—

Wren v. Holt, (1903) 1 K.B. 610,—(beer).

Bristol Tramways, etc., Ltd. v. Fiat Motors Ltd., (1910) 2 K.B. 831,—(motor omnibus).

MacEwan and Co. Ltd. v. Ashwin, (1916) N.Z.L.R. 1028,—(cream separator).

Taylor v. Combined Buyers Ltd., (1924) N.Z.L.R. 627,—(motor car).

Morelli v. Fitch and Gibbons, 166 L.T.Jo. 51,—(Stone's Ginger Wine).

In the case last cited a clerk on a Bank Holiday bought a bottle of that eminently safe and respectable beverage from the owners of an off-license shop and took it home in his pocket. Unfortunately there was a flaw in the neck of the bottle and it broke at the crucial moment and injured the buyer's hand. For this a Divisional Court consisting of Acton and Branson, JJ., adjudged the vendors should pay. This decision has swept over one of the last of the ramparts of old *Caveat Emptor*, already undermined by the tide of cases. Lord Justice Williams in *Wren v. Holt* (*cit. sup.*) had doubted whether a sale by description went so far, saying: "Speaking candidly, I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within Subsection (2) of Section 14. But in this case we have to consider the finding of the jury. They . . . adopted the suggestion of the learned Judge that the plaintiff went to this beerhouse . . . and asked to be supplied with beer of (a particular) description . . . Under these circumstances, . . . though the sale was one of beer in a beerhouse . . . there was a sale by description." Such doubts would appear at the present day to be of little avail against the current of modern opinion.

In *Dell v. Quilly*, (1924) N.Z.L.R. 1270, the question whether a bull sold under the description of a pedigree Jersey bull did not answer to that description because it was sterile, arose before Reed, J., who decided that it did, just as much as grass seed that will not grow still complies with the description of grass seed. The learned Judge held that the vendor who, although a dairy farmer, was not a breeder of stud cattle, was not selling "goods of a description which it is in the course of the seller's business to supply." There was therefore no implied condition that the bull should be of merchantable quality. There can be little doubt that the bull in question was not of merchantable quality and it may come as a matter of surprise to breeders of stud stock of any kind, to find that if they sell would-be sires, they guarantee the animals' fertility and are liable in damages if they are sterile.

Of course, if the defect is not latent and the buyer has examined the goods, the exception in Section 16 (b) does not apply.

With the liberal construction now given to its terms Subsection (b) of Section 16 reigns triumphant, but before it came into its own the aid of Subsection (a) was sought by evasive sellers. It did not, however, take much to persuade Courts in many cases to hold that the buyer relied on the skill and judgment of the seller and the facts often showed that the particular purpose for which the goods were required was made known to the vendor. The following cases afford instances of this :—

Randall v. Newson, 2 Q.B.D. 102,—(carriage pole).
Preist v. Last, (1903) 2 K.B. 148,—(hot water bottle).
Frost v. Aylesbury Dairy Co. Ltd., (1905) 1 K.B. 608,—(milk).
Manchester Liners Ltd. v. Rea Ltd., (1922) 2 A.C. 74,—(coal).
Turnbull and Jones Ltd. v. Amner and Sons, (1923) N.Z.L.R. 673,—(stone crusher).
Taylor v. Combined Buyers Ltd. (*cit. sup.*),—(motor car).

In some cases the harassed vendor endeavoured to protect himself by the proviso to Section 16 (a) : " Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose." The question as to what is a trade name in fact, was dealt with by Farwell, L.J., in *Bristol Tramways, etc., Ltd. v. Fiat Motors Ltd.* (*cit. sup.*) and also by Sir John Salmond in *Taylor v. Combined Buyers Ltd.* (*cit. sup.*). As to the proviso generally the latter Judge expressed the opinion (p. 632) :

" To the extent to which the buyer himself selects and indicates to the seller the class of article which he desires, by ordering it under a patent or trade name which indicates that class, he is conclusively deemed to rely on his own skill and judgment and not on that of the seller ; and if he gets from the seller an article which conforms to the type so selected he cannot, in the absence of express warranty, complain that it is unfit for his purpose."

This view was later confirmed by the Court of Appeal in England, in *Baldry v. Marshall*, (1925) 1 K.B. 260, where Atkin, L.J., said, at p. 268 : —

" It appears to me that the right view of the matter is that where the proviso speaks of ' the sale of a specified article under its patent or other trade name,' it means an article specified by the purchaser as being the article which he wishes to buy. If he so specifies the article and it is sold to him under its trade name it seems clear that the condition is excluded, even though he made known to the seller the purpose for which he intended to use it. But if on the other hand he buys the article in reliance on the seller's assurance that it will answer his purpose, the fact that it is described in the contract by its trade name will not have the effect of excluding the condition."

Salmond, J., also made it clear that in the case of the sale of an article under its patent name the vendor is still liable for defects that are not to be expected in articles normally conforming to the type manufactured under that name. For instance, a bottle of patent indigestion cure accidentally containing poison will involve the vendor in trouble.

Of two innocent persons it appears as if the vendor must pay, and the principle has the merit that it raises the standard of care and fair dealing more than the old doctrine did.

The Supreme Court Bench.

Wellington District Law Society's Letter to the Attorney-General.

The Wellington District Law Society has handed to us for publication the following copy of the letter of 2nd November, 1928, sent by the President of that Society to the Attorney-General (then the Hon. F. J. Rolleston) on the subject of appointments to the Supreme Court Bench : this letter, it will be remembered, was endorsed by the Council of the New Zealand Law Society at its meeting held on the 20th ult.

WELLINGTON DISTRICT LAW SOCIETY.
Supreme Court Library,
Wellington,
2nd November, 1928.

The Honourable,
The Attorney-General,
Wellington.

Dear Mr. Attorney,

As on a previous occasion you were good enough to afford to Members of the Council of the Law Society in Wellington an opportunity to lay before you their opinion as to the considerations that should guide appointments to the Bench, the Council, alarmed at the present appointment from outside the Ranks of the Bar (even though it is temporary), has directed me to write to you requesting your attention to the grave danger they consider is entailed by departure from traditional and well considered principles, which, as Leader of the Bar, the Council is sure you desire to see maintained. The Council holds that experience and standing at the Bar with their necessary implications are the only reliable assurance of capacity and competence as a Judge, and think it safe to say that reliance on qualifications of character and ability shewn in other walks of life, even in allied spheres of administration, however flattering, would prove disastrous to the administration of Justice. The Statutory requirement that a Judge shall be a Barrister of seven years' standing is not in the opinion of the Council, honestly satisfied unless the period required has been passed in actual and substantial practice at the Bar, and for such practice in the Profession the Council is of opinion that there is no recognised substitute nor need to find one.

The Council assumes it possible that non-professional colleagues unaware of the relation of Bench and Bar and the re-action of the one upon the other, and only generally cognisant of the mental and moral equipment requisite to occupancy of the Bench, may regard its dignity and emoluments as a fitting reward for public service outside the profession of the Law. The Council trusts that if such views are pressed you will resist them as opposed to the public interest.

The public is as aware now as at any time that a strong judiciary is essential to its welfare and the Press of the Dominion in the interest it shews in judicial appointments is but reflecting public opinion. The public gathers its opinion of the strength or weaknesses of judicial appointments in a great measure from the Profession, and the Council thinks it may be of some assistance to you to know that in its opinion the Profession regards any suggestion that the Magistracy or the Court of Arbitration can be steps to the Supreme Court Bench, as against public interest and subversive of the best interests of both Bench and Bar.

The Council does not think it an answer to point to known departures from the rule.

In the case of the Court of Arbitration the position has changed since 1908 when an appointment to that Court contemplated the possibility of the appointee succeeding to a place on the Supreme Court Bench.

Section 65 subsection 3 of the 1908 Act expressly enabled a Judge of the Court of Arbitration to be appointed a temporary Judge of the Supreme Court, but this Section was repealed by the Act of 1921-22, and is omitted altogether from the Act of 1925. The reason for and the significance of this change must be well known to you. The making, at the present time, of such a temporary appointment, as though such Section had not been repealed, has caused grave concern to the Profession.

It is needless to point out to you that the Presidency of the Court of Arbitration in no way fits the occupant of that office for the Supreme Court Bench, and is no substitute for practice at the Bar.

In the case of the Magistracy even in those cases where the Magistrate possesses the bare statutory qualifications the danger is twofold and an appointment from that body could only fail to be of incalculable harm unless its repetition were so clearly impossible, that no expectancy of promotion could possibly attach to Magisterial office.

In conclusion may I be permitted to say that the Council believes its views are in accordance with those already expressed by you and directs me to write to you as head of the Profession in the hope that you may be assisted by the knowledge that the Members of the Council will not hesitate if necessary to give public expression to the strong opinion held by the Profession generally against such appointments.

I have the honour to be,
Dear Mr. Attorney,
Your obedient servant,
H. F. JOHNSTON,
President Wellington District
Law Society.

Wasting the Court's Time.

That Mr. Hawkins who subsequently became Lord Brampton was one day for the plaintiff in a running-down case in which an Omnibus Company were the defendants. Reference was made in the course of the proceedings to a brougham, which word Mr. Hawkins pronounced "brough-am." But the presiding Judge, Lord Campbell, C.J., indicated his preference for "broom," and pointed out that Mr. Hawkins' bi-syllabic pronunciation was an unnecessary waste of the time of the Court. Mr. Hawkins bowed and lay low. In summing up the case to the Jury Lord Campbell alluded to the omnibus. With extreme politeness Mr. Hawkins intervened, reminding his Lordship that the conveyance was generally spoken of as a "bus," and suggested that the adoption of the abbreviated title would be a further and indeed a double saving of the Court's time.

It is a curious principle of our law that prisoners charged with having committed a crime are the only people in the world presumed to be innocent of it.—Lord Darling.

London Letter.

Temple, London,
10th October, 1928.

My dear N.Z.,

In surveying the prospect of the new legal year, which begins on Friday, October 12, next, we may at least discount the rumours, promises or threats (as you care to regard them) of all sorts of new legislation. No doubt the Departments and Draughtsmen are, in the vigour regained by vacation, contemplating all manner of Bills whether to create new law or consolidate the old; there are reports of intended legislation for the improvement of livestock, legislation as to children and (how positively thrilling) legislation pulling together the somewhat random and complex laws of baths and wash-houses! Parliament, however, reassembles early in November and, contemplating next year's general election, will not consent to sit very late into the following summer; and, with this short time at its disposal, it has to digest and deal with the imminent Local Government Reform Bill, a matter inevitably of more than a hundred clauses, we may be sure, and destined for much discussion, not to say argument. This with Finance will occupy its available time. I do not know what are your system and laws of local government but I am perfectly certain they are better, at least as to the understanding of it, than ours. No doubt your decentralisation was originally evolved in a manner suited to modern, or modernish, conditions; you do not suffer from our old age; I will not trouble you further with our internal troubles.

The Judicial Committee of the Privy Council proposes, as I am informed, to resume sittings on October 15. There are one or two Crown Colony Appeals left over; I should say my Long title affair from the Straits Settlements should come early, for it has been waiting long; but, making my enquiries with regard to the probabilities of other more recent matters of my concern, I am led to believe that there is such congestion as to Indian Appeals that two Boards will (subject to the taking of the *remanets* above mentioned) concentrate entirely on those for a while.

Signs of the professional activity which is scheduled to renew itself on Friday are already apparent. The lethargic Temple wakes up, yawns, shifts about a little and thinks seriously of work. At the same time the solicitors, who profess to content themselves with a very much meaner allotment of holiday, become noticeably busy; the Provincial Meeting of the Law Society, opening a week ago at Eastbourne, under the presidency of a certain Mr. Welsford, was an important and remarkable gathering. I will not accuse the solicitors of taking more holidays than they confess to, but I must insist upon it that there was such a vigour in their last week's proceedings as indicates anything but the aftermath of a long period of terrible pressure of work. Avoiding further invidious references (I may remind you that the barrister and the solicitor are very far from being fused, as yet, in England)—let us turn to their discussions.

No doubt the President's observations upon the merits and methods of company amalgamations were both learned and wise, but they do not interest us, in this letter, and I always half suspect that we lawyers have a higher opinion of business ability and importance and

efficiency than has the business man himself, and that the business man is the nearer to the truth of the two. When it comes to discuss the particular matter of accounting, as did the President in investigating this subject, my reflections become rather more, indeed impossibly, complex: for I am of those who do not look upon the Accountant as the heaven-sent genius of affairs and if it comes to comparing him with the lawyer, upon a claim to business utility, then I am a warm champion of the lawyer. I fancy that the accountant does much more to obscure than he does to elucidate the business which seems unable to go ahead unless his nose is poked into it.

There was a lot of talk, and you will see it reported somewhere or other no doubt, nor is the detail of such interest to you that I should reproduce it here, about the often conspired but never created "great professional law school in London." The ideal, or at least the idea, is that the Bar and the Law Society should combine to produce a central Academy of budding advocates and jurists. Educationally, this may be a wonderful conception; sociologically, the prospect appals. Men of every profession or, indeed, of every trade or business or pursuit ought to be kept separate from each other so much as is possible, and only assembled in mass formation when grave emergency dictates. We, you and I, love our professional brothers with a great and abiding love; but heaven forbid that we ever be assembled with them in one Hall (except for the purposes of a jovial occasion) for a moment longer than is essential. I should have thought the notorious effect which such association has upon schoolmasters of the ordinary schools, in diminishing their capacity for rubbing shoulders with the outside world, was enough to put anybody off any scheme for founding extraordinary schools. A college packed with young men, all going different ways hereafter and very persistent in their various, divergent views, is, to our thinking, one of the most pleasing things to contemplate, both in its present reactions and in its after effects. But a college packed full of young men, all going the same way hereafter and priggishly agreeing with each other that it is the Only Way, is a revolting conception. Our whole and our sole merit as lawyers is our gift of extracting the best from humanity; without humanity to work upon, we become so intolerable that not even the least intelligent of us would defend our profession for a moment or assert, as to it, the slightest *raison d'etre*. The President's lecture upon this topic was, to me, an admirable exposition of a current, growing fallacy: witness the single fact that we have systems of legal education such as our fathers hardly dreamt of, and it is with the utmost difficulty we produce an attorney or an advocate who, as a lawyer, begins to approach our fathers' standard.

The gentleman who spoke after the President, upon the Cost of Litigation (I noted, but regret that I have forgotten, his name) was very much less profound, very much less impressive, but astonishingly original and disturbing. He envisaged our old High Court and our more recently evolved County Court as from the eyes of a man who was then seeing them both for the first time; this is always a remarkable achievement and those who can rise to it usually produce some very striking results. So was it here; a paper was read which ought to be converted into a White Paper, and circulated among Ministers and contingent Ministers as such. It advocated a brusque method of taking the material (of both tribunals, the greater and the less) as it is, but rearranging it with a complete disregard of existing, and as the speaker protested anachronistic, systems. Shortly, he pressed for the recognition of one court only, the High Court, the existing High Court in London to be its central machine, the present County Courts to be its district machines. Quite how the speaker disposed of the High Court on circuit, I did not gather: I do not expect that this factor troubled him, and I can well imagine that it provided him from the point of view of duplication with the most effective arguments and a very useful butt. Altogether a most intriguing pronouncement, and one, I trust, which will be carried further. If the subject of litigation could thus drastically be handled, and reduced to a business-like and practical basis according to the needs and conditions of the day, by authoritative persons, then our trade might resume, if not its quondam prosperity, at least its normal industry. It is no new idea; and especially among the County Court Judges there is a coterie of first-class men who, chafing at their superimposed limitations, press to be allowed to extend and to meet the clamour of those demanding reform. In recent times, the Lord Chancellor (of whatever party) has taken a very different view of his function of appointing County Court Judges, no longer treating the appointment as a fit gift for a decrepit friend, but being at some pains to induce the right class of man to take on the responsibility notwithstanding its meagre reward in cash. Good men have been got in consequence; and a good man cannot for long keep silence when he becomes aware, beyond doubt, of two things: an urgent clamour for public services and his own ability, if let loose, to render them.

I have it from a friend that there is, as yet, no Bar gossip current; and as this intimation comes from the Attorney-General's chambers, I feel it is good enough for a conclusion.

Yours ever,

INNER TEMPLAR.

Transfer for Executory Consideration.

Registrability Under Land Transfer System.

Many interesting and useful decisions upon different questions under the Land Transfer System emanate from the Courts of Victoria and to their number another has been added in the recent case of *The King v. Registrar of Titles ex parte Moss* (1928) V.L.R. 411. There the registered proprietor of certain land executed a transfer, the consideration being stated to be—"In consideration of W. H. Aghan . . . . undertaking to have allotted and issued to me three thousand shares in Aghan Brothers Ltd. . . . . such shares to be of the value of One Pound each fully paid." On the same day one Moss advanced to Aghan £1,500 taking as security therefor a mortgage in the form prescribed by the Act, signed by Aghan, together with the unregistered transfer above mentioned. The transfer, mortgage and certificate of title were subsequently lodged for registration. The consideration for the transfer being executory the Registrar refused to register. The mortgagee moved to make absolute a rule *nisi* for a mandamus to compel him to do so. Irvine, C. J., held that there was nothing in the Transfer of Land Act, 1915, or to be inferred from its provisions, which precluded the registration of transfers for executory considerations and made the rule *nisi* absolute.

Solicitors' Trust Accounts.

The English Viewpoint.

In England the Profession, or rather the solicitors' branch of it, is apparently facing difficulties in the problem of the defaulting solicitor somewhat similar to those which at present confront the Profession in New Zealand. At the Law Society's Provincial Meeting the question was discussed in a paper read by Mr. George E. Hughes entitled "Some Observations on the Present Organisation of the Solicitors' Profession and Suggestions Thereon." Mr. Hughes' paper dealt with the question from two points of view—first, as to what steps should or could be taken for the protection of the public, and, secondly as to what steps could or should be taken to secure greater co-operation within the Profession. His treatment of the latter aspect of the matter hardly applies—at all events not in its full force—to conditions in New Zealand, but as to the public aspect of the problem his remarks reprinted below, have a much closer application.

"I suppose it is unhappily true that the Legal Profession have from time immemorial been subjected to adverse criticism and that the layman, for some inscrutable reason, has always and still to-day regards the lawyer with some degree of suspicion and dislike. Whilst, therefore, on this ground much public criticism of the Profession can be largely discounted, it is not perhaps unfitting that we should periodically take stock of the position and consider what (if any) reforms are called for, since reform, if it is to be, comes better in the form of gradual evolution and reorganisation from within rather than in revolution hastily imposed from without. There are indications that a feeling of unrest exists at the moment both in the lay mind and in the minds of certain of the Profession. There have unfortunately been a considerable number of cases of defaulting solicitors recently before the Courts. The Press do not minimise the gravity of these cases, and in the words of one of our professional journals, "it is idle for solicitors to shut their eyes, the public know of these cases; what do the Profession propose to do?"

PROTECTION OF THE PUBLIC. COMPULSORY MEMBERSHIP OF SOCIETY.

We have frequently been told in recent years from the Bench that it is now "the policy of the legislature to make the Council of the Law Society masters in their own house." Is it not then anomalous that, whilst the Statutory Committee selected from the Council of the Society now exercise disciplinary powers over the whole Profession, individual members of the Profession are not compelled by law to belong to the central body? The abstention of so many of the Profession to my mind indicates a lamentable lack of *esprit de corps* and necessarily leads to a lack of cohesion in our ranks. I would suggest that it is essential, both in the interests of the public as well as in the interests of the Profession, that greater co-ordination should be secured, and that this can only be accomplished through the Law Society taking powers to enforce membership of the central body and strict adherence to its rules of practice and etiquette, with consequential raising of the standard of professional feeling and conduct. It is, perhaps, not inappropriate here to quote Professor A. M. Carr-Saunders, Professor of Social Science at Liverpool University, in his recent Herbert Spencer Lecture, in which he stated that 'the development of professional associations was in harmony with the most outstanding feature of recent social evolution—the growth of organised groups. It was not in the nature of commercial corporations to inspire deep and permanent loyalty, but in vocational organisations—professional associations and associations of workpeople—with all their faults, some motives directed to the public good were generated. Professionalism had its weaknesses and dangers, but, taking all in all, the growth of professionalism was one of the hopeful features of the time. The approach to problems of social conduct and social policy under the guidance of a professional tradition raised the ethical standard and widened the social outlook. There was thus reason to welcome a development of which the result would be to increase the influence of professional associations upon character, outlook and conduct.'

Of the 15,143 solicitors taking out practising certificates for the current year, 10,053 only are members of the Law Society, of whom 4,158 practise in London and 5,895 in the country. Surely the time has arrived when compulsory membership of the Society should be enforced.

COMPULSORY AUDIT OF BOOKS.

At the present time it is open to a clerk, at the expiration of a period of service in articles, on passing certain examinations at intervals, and paying certain very substantial fees (the bulk of which are paid, quite unreasonably as it seems to me, to the Exchequer) to set up in practice as a solicitor, inviting the confidence of the public and holding himself out as a person to whom the public can entrust their most intimate and weighty concerns, involving the handling of very large sums of money. It is at least curious that, although one of the examinations which an articled clerk now has to pass is one in book-keeping, there is no law of which I am aware that compels him, once he starts practice as a solicitor, to keep books of any sort, or in any particular form, or having kept books to have those books audited by a firm of professional accountants. It may be urged that audit is no safeguard against a man who deliberately sets out to defraud. I, for one, firmly believe that the percentage of deliberately fraudulent solicitors is very small. The real value of audit rests on the periodical compulsion to face facts, and in the safeguard it provides for the man who is likely to drift into lax courses (as a result, perhaps, of one of the many forms of fraud and misfortune to which the Profession are subject and which bring discouragement and muddle in their train), with the result that books are not posted, A.'s money is applied (inadvertently, perhaps, at first) for B.'s purposes, and ultimately the crash comes. The mere periodical presence of an auditor in an office is a tonic, and reacts no less upon the

senior partner than it does upon the junior office boy, who finds a strange man of uncanny instincts displaying a keen interest in the contents, say, of the postage book, and there are, I believe, many cases in which the advent of the auditor would give the solicitor, faced with financial difficulties, pause, induce him to grasp the situation in its early stages, and thus prevent the final crash and disgrace. Bank managers, an honourable and respected body of men, are liable to surprise audit at the instance of visiting inspectors. Why should we resent liability to audit? The imposition of compulsory audit of books is, therefore, the second reform which I suggest merits the attention of the Profession. With the details of the scheme it is not possible to deal within the compass of this paper.

FIDELITY.

Having thus secured compulsory membership of the Central Body and the maintenance and periodical audit of books, cannot we usefully consider whether it is not possible to give the public some greater degree of security by the introduction of a system of fidelity guarantee. Solicitors themselves not uncommonly insist upon their cashiers and others effecting fidelity bonds. Members of the London Stock Exchange and the Paris Bourse all find substantial security. Is it reasonable that we, as a Profession, should be asked ourselves to give the public some measure of protection against misappropriation, and to introduce, possibly in collaboration with the larger insurance offices, a system whereby every practising solicitor would be called upon to enter into a bond guaranteeing his fidelity either by direct contract with the insurance company or by contribution to a common fund to be applied for this purpose? Whether the guarantee should or could be limited or unlimited are matters for consideration and negotiation. There would unquestionably be difficulties at first, due to the absence of data as to the amount of past defalcations, the amount of turnover and other factors. But these difficulties should not be insuperable. Cases of default amongst solicitors are comparatively rare. It is interesting to note in this connection that during the seven years ended December 31, 1927, only 68 solicitors out of some 14,000 to 15,000 odd annually taking out certificates were struck off the Rolls for professional misconduct, though there has been a regrettable increase in the figures for the current year. With the additional safeguard secured by compulsory audit the premium necessary to cover at least limited claims should not deter us when we consider the additional sense of security afforded to the public. I am myself inclined to think that, though at first only limited cover would be possible, as the experience of claims grew the premiums asked would materially decrease, with the result that ultimately unlimited cover could be obtained for comparatively small premiums. It may be urged that the existence of fidelity bonds would be a direct incentive to misappropriation, but I hardly think that this will be relied upon as a serious objection. Whatever view the Profession may take of such an innovation, there can be little doubt that the moral effect upon the lay mind would be very great. Here, then, we have a third reform which might reasonably be considered.

We are all conscious of the presence of a small number of men seeking admission to the Roll who are obviously unsuited for admission to the ranks of any professional body, and I would suggest that it is worthy of consideration whether more stringent tests (including possibly a *viva voce* examination) might not be introduced as part of the Preliminary or Intermediate Examination in justice to the candidates themselves, the Profession and the public, with a view to the early elimination of these men. I can well imagine that such an innovation would be welcomed by the conscientious examiner on whose mind some paper has left serious doubts as to whether the writer really has in him the makings of an efficient professional man. As is well known, the Board of Admiralty have already adopted this method when selecting candidates for the Navy.

It is curious to note in passing that no machinery exists at present whereby notification of the illness, lunacy, death, presentation of a bankruptcy petition, or accusation of a criminal offence are automatically reported to the central authority in order that steps may be taken to safeguard the interests of the clients. The Statutory Committee are only empowered to take action upon the complaint of an aggrieved party. Cases are on record where solicitors practising alone have been either ill or mentally affected and unable to attend to business for long periods, during which their practices have been left wholly in charge of unqualified persons. I have myself known instances where solicitors have died, leaving their own affairs and those of their clients in considerable chaos, whilst it was no part of anyone's duty to notify the Society with a view to the protection of the clients' interests by means of visiting inspectors specially retained by the Society and selected from a panel of solicitors or accountants experienced in such work. Are not the public entitled to protection in such cases?

In the discussion which followed the reading of Mr. Hughes' paper, Mr. C. E. Barry (Bristol) said that he had always been in favour of compulsory membership of the Society, and had never been able to understand why 5,000 solicitors who were not members should, without paying any subscription, take advantage of what was obtained for them by the members. He really thought that some system of compulsory auditorship might be adopted. He hoped that most solicitors had their accounts audited. He did not want that anything should be done in the nature of a panic, because, after all, the proportion of defaulting solicitors was exceedingly small, and the great mass of solicitors very properly had the confidence of their clients. He had heard it said that if a man wanted to be dishonest, he could keep out of his books particular items before presenting them to the auditors. In the main, offences were caused by speculations, and before a man knew where he was he was in a position of insolvency. Then he began to take the money of his client. If he had an examination of his books, and they were brought before him every year or half year, he would recognise his position and be enabled

to pull up in time before slipping into a position of dishonesty. There were only comparatively few cases where a man deliberately acted in a dishonest manner.

Mr. H. G. Pritchard said what they had to consider was the man who was starting business. It was proposed to add to his overhead charges compulsory auditing.

The President of the Law Society (Mr. R. M. Welsford) said he very strongly objected to the suggestion that the Profession was not an honourable one. He had always thought that he belonged to an honourable Profession.

Mr. Hughes, in reply, expressed his sympathy with the younger struggling man, but said that it was necessary to hold the balance between the interests of individuals and the interests of their clients. He had proposed to move a resolution, but, on the understanding that some of the suggestions he had put forward would receive the sympathetic consideration of the Council, his object had been gained.

Correspondence.

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

Dear Sir,

Natural or Reasonable User.

Some weeks ago your correspondent "Baron" quoted the case of *Gibbons v. Lenfestey*, (1915) 84 L.J.P.C. 160, as an authority on the extent to which a lower owner is bound to receive drainage from an upper owner; but a perusal of the case scarcely justifies the importance claimed for it. It does not appear to be reported in the Law Reports although it is in the Law Times—see 113 L.T. 55. The case really turned on a point of pleading. It arose in Guernsey where servitudes in relation to heritable property cannot be created by prescription but only by some written instrument, duly registered, proper for constituting heritable rights. The plaintiff in his pleadings referred to a verbal agreement as part of his title to discharge drainage water through a pipe. The defendant took a preliminary point that the agreement being a verbal one could not be given in evidence and the local Courts upheld this view. The Privy Council however decided to send the case back with a declaration that the exceptions pleaded by the respondents fell to be disallowed as exceptions prejudicial to the action and that the case should proceed. Lord Dunedin said: "What happened in 1872 need not be pleaded as an agreement; it need only be mentioned historically as the reason of the *et tus quo*. It is sufficient for the appellant, *prima facie*, to show that his is the superior close and that the natural water has been cast on the respondent's close in a certain place, and that the respondents at their own hand have interfered with the *status quo*. The right however of the superior proprietor is not quite absolute. The limits cannot be defined by definition but each case must depend on its own circumstances." The point raised by your correspondent was not considered.

Yours, etc.,

JOHN DOE.

Summary of Legislation.

Concluded from p. 309.

7. GENERAL ADMINISTRATION.

Copyright (Temporary) Amendment. (9th October, 1928). Between 1st October, 1927, and 31st August, 1929, broadcasting was not, and is not, breach of copyright in a musical work. Up to 7½ per cent. may be deducted from receiving set license-fees, and used to compensate claimants for what would otherwise have been a breach of copyright, the balance (if any), going to the Broadcasting Company. A tribunal to hear claims may be set up, and the bases of compensation are to be not only the merit of the claim, but the total value of apprehended claims and the total fund available.

Dangerous Drugs Amendment. (6th October, 1928). Informations under Part II. of the principal Act (dealing with opium) need no longer be laid by a Medical Officer of Health. Minor amendments.

Government Railways Amendment. (9th October, 1928). Machinery amendments consequent on substitution of a General Manager for the Railways Board. Appeal rights of employees modified. Sick-benefit funds of the Second Division may be subsidised up to £8,000 a year. Railway lands may be leased under the Public Bodies' Leases Act, 1908. Orders in Council throwing the cost of branch lines on the Consolidated Fund may be made retrospective. Fresh provision is made (coming into force on 1st June, 1929) as to motor-vehicles at crossings; the speed-limit will be 15 miles an hour, and "compulsory-stop" signs must be complied with; penalty, £10. Special superannuation rights are given to the General Manager and persons who left the Government railways for the service of the Wellington and Manawatu Railway Company.

Main Highways Amendment. (6th October, 1928, but retrospective in part). The Main Highways Board may dispense with part or all of any contribution from a local body for highway works, and refund contributions made since 1st April, 1928. Local bodies may (retrospectively since passing of 1926 Amendment) accept advances from the Board for their contributions, and repay by instalments. Minor amendments.

Maintenance Orders (Facilities for Enforcement) Amendment. (6th October, 1928). The reciprocity with other British Dominions proper created by the principal Act is extended to protectorates and mandated territories.

Mental Defectives Amendment. (1st January, 1929). The Mental Hospitals Department is formally constituted as a Department of State, with a Minister, and, as its permanent head, a Director-General of Mental Hospitals (the present Inspector-General of Mental Defectives). To the classes of "mentally defective persons" in the principal Act is added another, of "persons socially defective, i.e., persons who suffer from mental deficiency associated with anti-social conduct, and who by reason of such mental deficiency and conduct require supervision for their own protection or in the public interest"—a definition which appears to lack definiteness. An alternative procedure for admission to mental hospitals is provided, whereby the patient can be admitted on medical certificates only, and the Magistrate be consulted afterwards. A departmental medical officer may be one of the medical practitioners certifying for admission. A Board is created to promote the welfare of mental defectives, excluding those classed as "persons of unsound mind" or "persons mentally infirm." It is to compile a register of persons, being "mental defectives," not "of unsound mind," or "mentally infirm," whom it thinks should be classed as "idiots," "imbeciles," "feeble-minded," "epileptics," or "socially defective," and to provide them with supervision. Names are submitted by the Departments of Education and Prisons, and by Magistrates and Justices before whom persons are charged with an offence, reported on by a clinic to the Chairman, submitted by the Chairman to the Board, and entered on the Register of the Board, unless a parent or guardian or person having control (to whom notice must be given) objects, and

in such case only if a Judge confirms the Board's decision. The Board of its own motion, or a Judge on the application of the person registered, or a relative, may order a name to be removed from the register. Special institutions may be provided for registered persons. Recognition may be granted, and money paid, to "social-service organisations."

Motor-vehicle Insurance (Third-party Risks). (Nominally 1st January, 1929, but, as affecting the public, 1st June, 1929). Every motor-vehicle owner must effect third-party insurance. Every person in charge of a vehicle is deemed authorised agent of the owner. The indemnity of the policy is to cover every person holding a motor driver's license (it does not appear whether it must be a license covering the class of vehicle in question) who is in charge of a vehicle with the owner's authority. Every insurance company prepared to underwrite business notifies the Registrar of Motor Vehicles, and the owner nominates his company when paying his annual registration fee, and before he is issued with his number plates. The contract of insurance is then complete. The company's limit of liability is £2,000 for one passenger in the vehicle, £20,000 for all passengers, otherwise unlimited in amount, but limited as to range of liability by a clause similar to the excepted risks clause in ordinary policies giving similar cover. The Act replaces the insurance requirement in the Motor-omnibus Traffic Act, 1926. Death, insolvency, or liquidation of the tort-feasor does not defeat the claim of the person damaged, the claim being a charge on the insurance moneys. Insurance companies can apply to a Magistrate for cancellation of the motor driver's license of an owner, with appeal to the Supreme Court as under the Justices of the Peace Act. Machinery is afforded, and Orders-in-Council may afford more, for fixing and differentiating premiums, imposing penal premiums for use of a vehicle for a purpose not authorised by the scale of premium paid, and other matters. Though the Crown may be a tort-feasor, it can hardly be an insolvent one; nevertheless the Act is declared to bind the Crown.

Public Works Amendment. (25th September, 1928). S. 116 of the principal Act of 1908 is recast to give more elasticity and permit narrow roads, within and without boroughs, with approval by Order in Council, which may impose building-line conditions. The meaning of "subdivision" in S. 117 is extended to include any sale of part of a holding. Ss. 131 and 132, as to closing of roads, are recast, in effect omitting the requirement of an approving meeting of ratepayers where no objections are received. The provision applies in terms to Road Boards and district roads, but extends by reference to County Councils and County roads. Foreshore access, permitted by the 1911 Amendment as an alternative to road access, when land is sold, is extended to include access to a foreshore reserve. The Act will stand repealed from 1st January next, by the Consolidating measure (see above, Part 1 (a), Consolidation).

Summer Time. (9th October, 1928). The clock is thirty minutes in advance of standard time from the 2nd Sunday in October to the 3rd Sunday in March. The Act is to be in force for one year only, and does not affect shearing or grain-threshing awards or industrial agreements, unless the parties so agree; nor matters of astronomy, meteorology, or navigation.

Swamp Drainage Amendment. (6th October, 1928). Recasts the provision under which the Minister of Lands levies rates to cover charges of expenditure on swamp areas being drained by the Crown. Rateable lands are classified according to benefit derived, differential rating is authorised, and appeals from classification to a Magistrate are permitted, the provision being similar to those in the Land Drainage Act and River Boards Act. Rates for the Waihi and Kaitaia Drainage areas are suspended for this year and next, and rates paid will be refunded.

British Nationality and Status of Aliens (in New Zealand). (Reserved for Royal assent, and to come into force on Proclamation). Previous Acts incorporated and repealed. Part II of the Imperial Act now adopted, so that New Zealand naturalisation has Imperial force. Regulations may be made for various purposes.

New Zealand University Amendment. (9th October, 1928). A maximum of £25,000 is fixed for the subsidy payable on any voluntary contribution; this is retrospective. If the salary or equipment of any new Chair "has to be" provided from Government funds, the Minister of Education must consent; to these and other new Chairs the University Council must consent. National Scholarships are raised £5 in value. Fixed annual grants are given to the four colleges—Auckland, £9,750; Victoria, £7,750; Canterbury, £6,000; Otago, £15,350. The appointment of Vice-Chancellor is to be optional, but the University Council must appoint a Pro-Chancellor, who is substituted for the Vice-Chancellor where named in the principal Act. Honorary degrees may be conferred. There are other amendments of detail.

8. CRIMINAL LAW.

New substantive crimes created by the **Mental Defectives Amendment Act** (noted above in Part 7, General Administration), are having, or attempting to have, carnal knowledge of any person registered under that Act; being a parent or otherwise in control of such person and wilfully or negligently allowing such event to happen; or supplying intoxicating liquor for any mental defective.

9. LOCAL AND PRIVATE LEGISLATION PASSED AS PUBLIC ACTS.

Auckland Grammar School Amendment. (6th October, 1928). Changes date of annual election of Education Board's representative on Grammar School Board.

Auckland Transport Board. (Comes into force when (a) the Auckland City Council has approved it; (b) a poll of Auckland City ratepayers has approved it; (c) polls of ratepayers of nine surrounding districts affected have approved it, the votes of all these districts being taken together; (d) the result of the polls has been gazetted). A new local body set up with obligation to acquire trams and motor-omnibuses of the City Council, and a monopoly of transport in the district by tramways and "motor- and horse-omnibus services and any like public passenger-conveyance services by any vehicle plying or standing for hire for the conveyance of passengers at separate fares." Power to borrow for the whole or parts of the district.

Auckland University College Reserves Amendment. Vests certain closed roads in the College Council, with power to sell, except minerals.

Canterbury College and the Canterbury Agricultural College Amendment. (6th October, 1928). The respective College Boards get power to grant renewal leases during currency of existing leases (not earlier than three years nor later than one year before expiry).

Canterbury Provincial Buildings Vesting. (9th October, 1928). A Board is incorporated consisting of the Minister of Lands and the Canterbury members of both Houses of Parliament. In it is vested the site of the Canterbury Provincial Council Chamber, with power to let, duty to repair, but no power to make structural alterations or erect new buildings. The buildings adjoining are similarly vested, but the general Government may remain in possession so long as required. Maintenance is to be met by Parliamentary appropriation. This Act contains no provision for payment of expenses to members of the Board.

Local Legislation. (9th October, 1928). 79 sections, dealing largely with finance, validating illegal expenditure incurred, and authorising expenditure that would otherwise be forbidden by law; in some cases conferring powers to deal with special property. Section 18 reverses **Broad v. Chairman, etc., of County of Tauranga,** (1928) G.L.R. 435.

Reserves and Other Lands Disposal. (9th October, 1928). Compared with like Acts of recent years, a shrunken measure, containing 19 operative sections, all strictly covered by the title.

Counsel (at last sitting of the Court of Appeal): "In this case your Honours, I shall have to go into some very delicate law."

MacGregor, J.: "Not 'delicate' in the sense of 'infirm,' I hope, Mr.——."