New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Law is the cement of Society."
—Lord Phillimore.

Vol. IV. Thursday, December 20, 1928. No. 22

The Closing Year.

During the year now drawing to a close the Supreme Court Bench suffered great loss through the death of the Honourable Sir William Sim and the regrettable illness of His Honour the Chief Justice. The vacancies caused by the retirement of Mr. Justice Stringer and the death of Mr. Justice Alpers were filled by the appointment of Mr. Justice Blair and Mr. Justice Smith. Both these new Judges are comparatively young men and have had to undertake a great deal of work without the advantage of having the great experience of Mr. Justice Sim and the Chief Justice in the background. They appear, however, to have risen to the emergency, and as far as we are aware the work of the Court has been kept well up to date. This, no doubt, is in part due to the fact that the year has not been a heavy one for litigation and that the number of important cases that have reached the Courts is extremely small. In the absence of the Chief Justice this has been a fortunate circumstance, but both Bench and Bar will welcome the return of Sir Charles Skerrett to his accustomed seat in the early months of the coming year. His extensive experience in all branches of law is admittedly regarded as a great source of strength. Though his return, when it comes, will be greatly welcomed, all concerned hope that his sense of duty, and his desire to resume his work, will not make him hasten back before his strength fully fits him for the task.

The death of Sir John Hosking was keenly felt by the Profession, as in his retirement he had not only maintained relationship with his brethren on the Bench and with members of the Bar, but had remained in close touch with matters affecting the Profession and the march of Law. The Knighthood conferred on Mr. Justice Stringer on his retirement from the Bench was well earned. The learned Judge served his country well as an able and industrious Judge who had earned the confidence of the public and the Profession, and his departure, when he seemed in the zenith of his powers, cast a doubt on the expediency of the rigid rule of retirement enforced by Statute.

The Magistracy has suffered by the retirement of Mr. Free and Mr. Riddell. Mr. Riddell has served as a Magistrate for a period of some twenty-four years. His loss in Wellington, where his impartial and able administration of the duties of his office has been fully appreciated, and where he was held in the highest regard by members of the Profession, will be greatly felt. The qualities requisite for a successful Magistrate are of a very high order, and the office, at any rate in the four principal Cities of the Dominion, has gradually advanced very much in importance. New Zealand has been singularly fortunate, and is still singularly fortunate, in its Magistrates ; but is doubtful whether the extreme importance of the duties carried out by Magistrates, and the necessity the Country is under to see that the quality of men obtained for these positions is maintained and that they are suitably remunerated, is generally recognised. A falling off in the quality of the Magistracy would be as fatal as a falling off in the quality of the Supreme Court Bench.

As the year closes a new Attorney-General takes office. We should have been glad if the term of the late Attorney-General (the Honourable F. J. Rolleston) had been distinguished by the passing of the Amendment to the Law Practitioners' Act, giving increased powers to the Law Society and containing provisions to enable the constitution of a Guarantee Fund. Mr. Rolleston did not appear to be sufficiently enamoured of the proposals to lend the weight of his influence to their passage through the Lower House. It may perhaps be that he considered that delay and further consideration were in the true interests of the Profession, but it is to be hoped that the Honourable Mr. Sidey, the Attorney-General of the present Government, will believe, as does the Profession of which he is the head, that the proposals are in the best interests both of the Profession and of the public, and that nothing is to be gained, but much to be lost, by further delay.

The year has in a sense been a disappointing one to the Profession by reason of the failure of its efforts to induce the Legislature to increase the powers of the Law Society ; nevertheless we believe that the activities of the Law Societies throughout the country have never been greater, and that the holding of the first Annual Conference has led to a corporate feeling amongst Lawyers which is bound to bear useful fruit. The Profession is undoubtedly suffering, to an extent greater perhaps than other sections of the community, the effect of the changed avenues of investment into which investors have been forced by a period of depression. It would be foolish for the Profession to stand still and fail to adapt itself to changing circumstances, and it would be folly to encourage young men to enter the Profession without careful consideration of the problem as to how many Solicitors per thousand of population are really required. It is particularly gratifying to notice the growing feeling within the Profession that, if it is to maintain the status in the community which is its due, it must, to some degree at any rate, close up its ranks, and must assume greater control over its members.

The indications are that the coming year will be a prosperous one for the Dominion, and in this prosperity the Profession should share. No one can deny that, on the whole, the legal work of the community is done expeditiously, cheaply and well. Problems will, of course, arise from time to time, and will vary and grow in importance as the population increases, but there can be no doubt that the Profession will be well able to deal with them. To the Profession we extend our best wishes for the New Year, and express the hope that by maintaining its traditions, meeting the needs of the community, and consolidating its ranks, it will serve the public faithfully and enjoy the measure of prosperity and confidence to which it is entitled.

Supreme Court.

Adams, J. October 24; November 12, 1928.

JAMES v. WAIMAIRI COUNTY COUNCIL.

Town Planning—Refusal by County Council to Issue Permit to Build Shop—Council Taking Active Part in Promotion of Combined Scheme—No Regional or Local Scheme Prepared—Power of Council to Refuse Permit—Section 34 of Town Planning Act, 1926, Not Applicable to County Councils—Question as to whether Compensation Payable in Respect of Refusal to Issue Permit Not Answered on Originating Summons—Town Planning Act, 1926, Sections 2, 3, 25 (1) (4), 28 (5), 29 (1) (2) (b), 34.

Originating summons to determine certain questions upon the construction of Section 34 of the Town-Planning Act 1926. The plaintiff, being the owner of a parcel of land within the County of Waimairi and adjacent to the City of Christchurch, applied to the defendant Council for a permit to erect a shop thereon. The Council, intending to act under the powers conferred upon local authorities by Section 34 of the Act, refused to grant the permit. The County of Waimairi was a rural area exclusive of any town district or borough. The Council had not been required under Section 25 (1) to submit a regional scheme, nor had it taken any step towards the preparation of such a scheme for its own district under the power conferred by Section 25 (4). The Council had, however, together with the Councils of certain other local authorities, including the City of Christchurch, taken an active part in the promotion of a scheme under Section 28, for the purpose of uniting all such local authorities in one combined scheme. That movement had been approved by the Director of Town-Planning. The local authorities interested had passed resolutions to unite for the purpose of preparing that scheme, and approving of a proposal for an aerial survey of the whole area occupied by the local authorities concerned. These steps had all been taken before the plaintiff made his application for the building permit.

The questions submitted for the determination of the Court were: (1) Whether the Council was empowered to refuse a permit to the plaintiff to build a shop on such land upon any of the grounds set out in Section 34. (2) If so, whether Section 29 (2) (b) dealing with the character of buildings precluded the plaintiff from claiming compensation under that Section for the refusal of the Council to issue a building permit for the erection of a shop.

Upham for plaintiff.
Hutchison for defendant.

ADAMS, J., said that it was clear on the plain meaning of Section 28 that the activities of those local authorities had so far been preliminary only to the formation of a combined committee; but until a committee had been duly appointed and approved by the Town-Planning Board there was no merger under Subsection (4) and each local authority retained its individuality, powers, and responsibility. There could be no doubt that unless and until a combined committee was duly constituted the Council might at any time resolve under Section 25 (4) to prepare a regional planning scheme for the whole or any defined portion of the county. Further, in His Honour's opinion such a resolution would not stand in the way of the proposed combined scheme or any other scheme of united action. If a County Council of its own volition proceeded with the preparation of a regional plan under Section 25 (4) it would, His Honour thought, come within the definition of a "responsible authority," in Section 2, although by Section 25 (4) the preparation of the scheme would be optional. When a Council had duly resolved to prepare a scheme it thereupon became the Council "responsible for the preparation of that scheme,"—see Section 2. His Honour saw no reason why it should not in such case also come within the words "County Council or other responsible authority," in Section 29 (2) (c). No such action had, however, been taken in the present case, and those questions did not arise.

The answer to the first question depended upon the construction of Section 34 (1). On first impression His Honour was inclined to the view that the words "at any time after the commencement of this Act and pending the preparation and approval of a town-planning scheme" covered the whole period between the day when the Act came into operation and the approval of a scheme, and on consideration His Honour adhered to that opinion. The intention was to fix the period during which the powers were to be exercisable, and that was done by enacting that they should attach on the day the Act came into force and continue until a scheme had been approved. Upon such approval it became the duty of the local authority to enforce compliance with the scheme—Sections 23, 27—and such powers were no longer necessary. In the meantime any person having an interest in land injuriously affected by the operation of Section 34 was entitled to compensation under Section 29, except in the cases mentioned in Subsection (2). Where there was no scheme in course of preparation, or where there was such a scheme, but no notice was given as provided by paragraph (c), full compensation was payable. The next question was whether County Councils were within the ambit of Section 34. In order to bring County Councils within the Section the expression "a town-planning scheme" in the second line must be extended by construction to "a town or regional planning scheme" or "a scheme under this Act." But the effect of Section 3 was to confine "town-planning scheme" strictly to schemes in relation to the development of cities or boroughs, and throughout the Act the distinction between town and regional planning was carefully observed. That distinction was preserved as far as possible in the case of combined schemes by Section 28 (5). His Honour could find nothing in the Act to justify the extension suggested. No doubt the words "any local authority" as defined in Section 4 of the Acts Interpretation Act, 1924, were wide enough to include all local authorities affected by the Town-Planning Act, but that definition applied only so far as it was not consistent with the context. In the present instance His Honour thought the context required that it should be limited to such local authorities as were charged with the preparation of town-planning schemes. His Honour thought, therefore, that the action of the defendant Council was *ultra vires*.

With regard to the second question His Honour found that the expression "character of buildings" which occurred in Section 29 (2) (b) was explained in the regulations made under the Act—N.Z. Gazette, 1927, p. 613—which read as follows: "The character of the buildings (as for example, whether dwellinghouses, or shops, or public buildings, or workshops, or factories for inoffensive trades, or partly one class of building and partly another class)." That agreed with the tentative opinion expressed by His Honour during the argument and which His Honour still held. All claims to compensation under Section 29 were, however, to be determined by a Compensation Court under the provisions of the Public Works Act, 1908, and questions of law arising before such Court were, by Section 68 of that Act to be determined by the President, or by the Supreme Court on a case stated by him if he so thought fit. His Honour did not think it desirable, therefore, to answer the question.

Solicitors for plaintiff: **Johnston, Mills and White,** Christchurch.

Solicitors for defendant: **Dougall, Son and Hutchison,** Christchurch.

Blair, J. November 16, 1928.
Auckland.

IN RE WRIGHTSON (DECEASED).

Administration—Testator Domiciled in England—Property in England and in New Zealand—Separate Executors—Power of Court to Grant Probate in Respect of New Zealand Estate to New Zealand Executors Before Probate Obtained in England—Consent of Court to Removal of Original Will From Court File.

Application by the Public Trustee for probate limited to the New Zealand estate of a testator domiciled in England, who died in New Zealand, leaving property both in England and in New Zealand and who had appointed certain executors in respect of his property in England and separate executors in respect of his property in New Zealand. With the consent of the Court the New Zealand executors had pursuant to Section 13 (1) of the Public Trust Office Act, 1908, appointed the Public Trustee in their place. Probate had not been applied for in England, application being first made in New Zealand because there were urgent matters requiring attention. The application asked

that leave be reserved to the English executors to obtain probate in respect of property not situate in New Zealand. In order to enable the English executors to apply for probate in England on the original will and codicils, application was made to the Court for leave to the Public Trustee to uplift from the file of the Court the original will and codicils, to leave certified copies on the file of the Court in their place, and to transmit the originals by registered post to the executors in England.

Alexander in support of application.

BLAIR, J., said that the two questions arising were: firstly, whether the Court could grant probate to New Zealand executors when the Court of the testator's domicil had not dealt with the matter, and secondly whether the original will and codicils could be removed from the file as requested. In **In re Aldis,** 16 N.Z. L.R. 577, the Court held that the test of jurisdiction to grant probate or administration in New Zealand was the existence of real or personal estate in New Zealand. Section 2 of the Colonial Probates Act, 1892, authorised the resealing in England of a probate granted in any British possession to which the Act was made applicable. It was not intended in the present case to apply for a resealing of the New Zealand probate, but the English executors would themselves apply for probate in England. The fact that an original application would be necessary in England did not seem to His Honour to prevent the grant of probate in New Zealand to a New Zealand executor, such probate being limited to the New Zealand estate as directed by the testator. The Colonial Probates Act was an enabling statute and there was nothing in it which prevented the making of a new application for probate in England instead of resorting to resealing. **Irwin v. Caruth** (1916) P. 23, where it was decided that the fact that an Irish probate had not been resealed did not take away the power of the English Court to grant probate, and **Meyappa Chetty v. Supramanion Chetty,** (1916) 1 A.C. 603, 609, were clear authority for the proposition that it was not necessary to wait for the English probate to be obtained. It was not impossible for probate to be granted in England without the production of the original will, but the English Court, being the Court of domicil, was the Court where primarily the application for probate should have been made, and where the original will would be deposited. It was not the practice to attach the original will to the executor's affidavit. It was marked as a separate exhibit, and filed with the affidavit. **In re Russell,** 29 N.Z.L.R. 365. Rule 205 inferentially authorised the removal of exhibits, and His Honour thought that the present case was one in which such removal should be permitted subject to an exact copy of the will and codicils certified by the Registrar as exact copies being left on the file.

Solicitors for the Public Trustee: **Alexander, Bennett and Sutherland,** Auckland.

Blair, J. July 30; October 31, 1928.
Auckland.

PALMER v. WRIGHT.

Will—Restraint on Alienation—Gift to Children and with Provision "That They Shall Not Nor Shall Any of Them Have Power to Anticipate the Same"—Restraint Applicable to Shares of Sons and Daughters Alike—Voluntary and Involuntary Alienation Prohibited—Charging Order nisi against Share of Son Set Aside—Property Law Act, 1908, Section 24.

Motion by the plaintiff to make absolute a charging order *nisi*, made under Rule 314 (1), charging the defendant's interest under the will of his father. The defendant objected that by the terms of his father's will no valid charge could be made against his interest. Under his father's will which was executed on 27th November, 1909, the defendant was entitled during his life to a sixth share of the income of the deceased's residuary estate. That income was divisible among all the family—four sons and two daughters—and the will provided that it should be paid "to all my said six children in equal shares for and during their respective lives and so that they shall not nor shall any of them have power to anticipate the same."

Cocker for plaintiff.
Uren for defendant.

BLAIR, J., said that the will had evidently been prepared subsequent to the passing of Section 24 of the Property Law Act, 1905, which section had been re-enacted as Section 24 of the Property Law Act, 1908. It was clear from that section that assuming the testator intended to prevent execution on his children's income he had power so to provide by will. The question, therefore, was whether the use by the testator of the words "so that they shall not nor shall any of them have power to anticipate the same," was a sufficient exercise of his power under Section 24 to prevent an execution creditor from seizing any of the children's income. Words negativing a power to anticipate were used in the books of conveyancing forms only in respect of married women. The term was not used in respect of males and the reason for that obviously was that such a restraint would not be effectual—**Williams on Real Property,** 24th Edn., 117. It was not disputed that the clause would protect the shares of the married daughters, but the fact that there were daughters was relied upon as indicating on the testator's part an intention to refer to daughters and not to son's shares. The wording of the will, however, clearly indicated an intention on testator's part to make it apply to all his children. He said "to all my said six children for and during their respective lives so that they shall not nor shall any of them. . . ." It was impossible to read these words as excluding sons' shares.

It was further contended that the use of the words "power to anticipate the same" meant a prohibition against voluntary alienation, and had no application to involuntary alienation at the hands of a creditor, and that, except as expressly authorised by Section 24, all restraints on sons' shares were invalid. His Honour thought it must be taken that the testator intended to preserve for his children the income he had left them by his will. Section 24 was, in his view, intended to confer the power on parents or grand-parents to what was colloquially called "tie up" their children's or grand-children's shares, whether male or female. Before that Section was passed, there was a power, frequently exercised and well understood by conveyancers, to restrain anticipation by married daughters. Since Section 24 was enacted, it was possible to impose on a son's share the same restraint that it was formerly possible to impose on a married daughter's share. Instead of using the precise words of the Section, the draughtsman of the will had used for both sons and daughters words which were well understood when used for married women. If he had used the precise wording of Section 24, he would have provided no more than would have been ensured by restraining a married woman from anticipation. As Section 24 permitted a like restraint for a son or an unmarried daughter, His Honour thought it was proper to give to the testator's will the meaning he intended to convey: **Kidd v. Davies** (1920) N.Z.L.R. 486, was authority for the proposition that a testator need not exercise the whole of his powers under Section 24.

The third point taken on behalf of the plaintiff was that the use of words forbidding restraint on anticipation *simpliciter* did no more than forbid voluntary anticipation. In support of this, Mr. Cocker quoted some authorities where, on a gift of income followed by a forfeiture effective on alienation, it was held that an involuntary alienation by bankruptcy or other operation of law did not constitute a forfeiture. Those cases were collected and discussed in **Jarman on Wills,** 6th Edn., 1507, and in **Lewin on Trusts,** 13th Edn., 146. The same subject was discussed in **Official Assignee v. Parkinson,** 4 N.Z.L.R. (S.C.) 145. Those cases all turned on the precise words used in the instrument in question in each case. No case was quoted where such a gift to a married woman was held liable to seizure on execution by a creditor. It was clear that a married woman subject to restraint on anticipation could not by any means deprive herself of the right to receive the income as it became due. The authorities on that subject were collected in **16 Halsbury,** 364 *et seq.* It appeared to His Honour that Section 24 authorised a father or grandfather to do for a son or grandson that which formerly could be validly done for the benefit only of a married woman. If the restraint imposed protected a married woman's share, then since the passing of Section 24 a like restraint would protect a son's share.

His Honour, therefore, made an order setting aside the charging order *nisi.*

Solicitors for appellant: **H. R. Duggan,** Auckland.

Solicitors for the defendant: **Gittos, Uren, Gregory and Bourke,** Auckland.

Smith, J. October 3; 20, 1928.
Auckland.

KEWENE v. ALFRED BUCKLAND AND SONS, LTD. AND MAIDEN.

Tort—Conversion—Wrongful Distress—Sheep Belonging to Estate Wrongfully Seized by Bailiff Under Distress Warrant and Sold by Auctioneer—Action Against Auctioneer for Damages for Conversion—Bailiff Subsequently Joined—Election Not to Proceed Against Bailiff—Auctioneer Not Thereby Released—Auctioneer Entitled as Agent for Bailiff to Benefit of Period of Limitation of Actions Imposed by Section 183 of Magistrate's Courts Act, 1908—Auctioneer a "Person" Acting bona fide Under Mandate of Bailiff—Heading Not Affecting Construction of Section—Magistrate's Courts Act, Section 183—Acts Interpretation Act 1924, Section 5 (f)—Acts Interpretation Act 1925 Section 2—Judicature Act, 1908, Section 94.

Action by plaintiff, as administrator of the estate of Pairama Keena, deceased, claiming damages for the wrongful seizure and sale of goods belonging to the estate. The deceased died intestate, on 9th November, 1923, but administration was not granted to the plaintiff by the Native Land Court until 27th March, 1927. Shortly after his appointment the plaintiff discovered that some sheep which belonged to the estate had been seized under a distress warrant issued by one Allen, against one of the testator's sons, Ben Pairama, to obtain satisfaction of a judgment against him with costs amounting to £63 12s. 6d. The distress warrant had been issued to the defendant Maiden, the bailiff, and with it was delivered a letter written by the solicitor for the judgment creditor agreeing to indemnify him against any action which might be taken by persons claiming an interest in the goods seized. The bailiff went to the deceased's farm at Pongatiki and arranged with Ben Pairama to take 97 sheep to satisfy the warrant. The bailiff then instructed the agent of the defendant company in Pongatiki, to sell the sheep. The sheep which had been seized were accordingly sold on 14th July, 1927, on behalf of the bailiff, by the defendant company, and account sales were rendered to the bailiff, together with a cheque for the net amount realised. This was paid into Court to satisfy Allen's debt. The evidence adduced did not establish that the defendant company knew when it sold the sheep that the sheep belonged to the estate, nor that it was aware that the sheep had been seized under a distress warrant against a member of the Pairama Keena family. The plaintiff in these circumstances claimed damages from the defendant company.

Prior to the hearing, the bailiff was added as a defendant by order of the Supreme Court, dated 19th September, 1928, such order being made at the instance of the defendant company on an interlocutory application. The plaintiff opposed the making of the order, and at the hearing intimated that he did not intend to proceed against the bailiff, who was thereupon dismissed from the suit. At the close of the plaintiff's case counsel for the defendant company moved for a non-suit on the grounds: (1) that the defendant company was a joint tort-feasor with the defendant Maiden, and that the plaintiff had elected not to proceed against the latter, thereby releasing the former from liability, and (2) that the acts done by the defendant company were done in pursuance of the Magistrate's Court Act, 1908, and that the defendant company was a person entitled to the benefit of the limitation upon actions imposed by Section 183 of that Act.

Holmden for plaintiff.
Burt for defendant company.
McVeagh for defendant, Maiden.

SMITH, J., said that as to the first ground of nonsuit, he was of opinion that the plaintiff was entitled to select as a defendant whichever of the joint tort-feasors he thought fit. When the action was opened, the position was that the plaintiff elected not to proceed against the defendant who had been joined on the interlocutory application. In His Honour's opinion, the plaintiff was entitled to make this election. Joint wrongdoers were jointly and severally liable for the damage they caused, and either might be sued separately for the total loss. If the plaintiff sued both, he could elect not to proceed against one, but to proceed against the other to judgment and execution for the full amount of the damage. It might also be the case that, even in such circumstances, Section 94 of the Judicature Act, 1908, permitted him to proceed to judgment against the other joint wrongdoer, if the first judgment were not satisfied; but His Honour did not find it necessary to decide that point. It was also claimed by Mr. Burt that the dismissal of Maiden from the suit was in effect the entry of a judgment between the plaintiff and Maiden; a judgment, he said, destroyed the cause of action against the defendant company. The dismissal of a party from a suit was, however, not the entry of a judgment. It prevented any judgment from being entered for or against that party.

The plaintiff claimed: (1) that the defendant company knowingly intermeddled with trust property; (2) that the defendant company converted the property; (3) that on neither head of claim was the defendant company entitled to rely upon the protection of Section 183 of the Magistrate's Court Act, 1908. With regard to the first ground of the plaintiff's claim His Honour held that there was nothing in the evidence which would justify him in finding that the defendant company knew that the particular sheep sold belonged to the estate or that they were being sold to satisfy a debt not due by the estate. In order to deprive the defendant company of the protection of Section 183 of the Magistrate's Court Act, 1908, His Honour thought that he ought to be able to infer from the evidence that the defendant company actually knew at the time of the sale that it was knowingly, and therefore in bad faith, intermeddling with trust property. His Honour was unable to reach that conclusion, and the plaintiff's claim on that head therefore failed. As to the ground of conversion, His Honour assumed against the defendant company that what it did amounted to a conversion of the sheep, and that it was not entitled to be treated as a mercantile agent in possession of the goods with the consent of the owner. Assuming that, the defendant company pleaded Section 183 of the Magistrate's Court Act 1908. Mr. Holmden, for the plaintiff, contended: (1) that the defendant company was not a person within the meaning of Section 183; (2) that, if it were such a person, then it did not act in pursuance of the Magistrate's Court Act, 1908; (3) that if it were such a person acting within the meaning and in pursuance of the Magistrate's Court Act, 1908, it did not act in good faith and was not entitled to the benefit of Section 183.

As to the first point, counsel for the plaintiff quoted the dictum of Stout, C.J., in **Meikle v. Wellington Loan Company, Limited,** 31 N.Z.L.R. 217. The Chief Justice was not, however, prepared to dissent from **Gordon v. Buttery,** 39 N.Z.L.R. 276, where it was held by Cooper, J., that the protection extended to a party *bona fide* applying for a warrant of execution against the person. The doubt which Stout, C.J., expressed rested upon the heading of Sections 182 to 184, and it was removed, His Honour thought, by Section 5 (f) of the Acts Interpretation Act, 1924, replacing Section 4 of the Acts Interpretation Amendment Act, 1908, but without the limitation imposed by the latter section whereby its operation was limited to Acts passed after the commencement of the Amending Act. Section 2 of the Amending Act of 1925 made the provisions of Section 5 (f) relevant to the Magistrate's Court Act, 1908. It followed that the heading did not affect the interpretation of the Act. Mr. Holmden further submitted that the defendant company was not a person within the Act, on the ground that it was an independent contractor making its own profit, and not a servant or agent of the plaintiff. Under the Magistrate's Court Act 1908, Section 114 (3), a bailiff could act as an auctioneer, but by Rule 49 of the Rules made under the Act, the bailiff was bound to employ an auctioneer to sell the goods and chattels seized under a warrant of distress unless he were otherwise directed by the Magistrate. In the present case, there being no direction by the Magistrate to the contrary, the bailiff was bound to employ an auctioneer, and the act of sale which constituted the conversion was, therefore, done under the direct mandate of the bailiff. His Honour distinguished **Kent County Council v. Folkestone Corporation,** (1905) 1 K.B. 620, where an independent contractor was held not entitled to the protection of the Public Authorities Protection Act, 1893, on the ground that the damage was in that case not done under the mandate of the public authority, and also distinguished **T. Tilling Ltd. v. Dick Kerr and Company Ltd.,** (1905) 1 K.B. 562, **Attorney-General v. Company of Proprietors of Margate Pier and Harbour,** (1900) 1 Ch. 749; and **Lyles v. Southend-on-Sea Corporation,** (1905) 2 K.B. 1. In **Greenwell v. Howell,** (1900) 1 Q.B. 535, it was held that persons acting under the mandate of a public authority in furtherance of a public duty were themselves performing a public duty and entitled to the protection of Section 1 of the Public Authorities Protection Act, 1893. His Honour thought that the case established that any person doing any specific act in the furtherance of the public duty of a public authority pursuant to the competent direction, mandate or order of that authority, whether such person was a servant and bound to obey that order or an agent at liberty to accept it or decline it, was entitled to the same protection in respect of that act as would be afforded to the public authority if it had performed the act

itself. Whether the defendant company was an independent contractor or a servant of the bailiff could make no difference to the essential fact that in this case the bailiff was both competent and obliged to constitute the defendant company or some other auctioneer his agent to effect the sale. It was the sale, and not the method of sale, which operated as the conversion of the plaintiff's goods. So far as the act of sale was concerned, the defendant company acted under the bailiff's mandate. His Honour thought, therefore, that the defendant company equally with the bailiff was to be regarded as a person within the meaning of Section 183 of the Magistrate's Court Act 1908.

Counsel for the plaintiff next contended that the defendant company did not act in pursuance of the Act. The goods which were sold were not those named in the warrant of distress. They belonged to the estate of Pairama Keena, and not to Ben Pairama. Unless therefore the bailiff seized the goods he was directed to seize, neither he nor the defendant company acted in pursuance of the Act. This was, however, not the view which had commended itself to the Courts. His Honour referred to 23 **Halsbury** 343 ; **Newel v. Starkie,** (1920) 89 L.J. (P.C.) 1 ; **Burling v. Harley and Plater,** 3 H. & N. 271. Upon the authority of the latter case His Honour thought that where a bailiff was directed to distrain the goods of A, and where in all good faith he distrained on the goods of B, believing them to be the goods of A. he was entitled to the protection afforded by Section 183 of the Act in that what he did was done in pursuance of the Act. If the bailiff was protected, so also should be the defendant company, for His Honour held that the defendant company was a person within the section. It was clear also that a party at whose instance the bailiff acted was protected by the section ; **Wyeth v. Kitto,** 17 N.Z.L.R. 88 ; **Gordon v. Buttery,** 30 N.Z.L.R. 276. It would be strange if the bailiff's agent were not similarly protected. Moreover, if the agent were not protected, the agent would be liable in conversion without any limitation of action beyond the ordinary period of six years, whereas the bailiff and the parties upon whose application both the bailiff and his agent had moved would have the benefit of the limitation of three months conferred by Section 183. If judgment were obtained against the agent after the expiration of three months, he would in certain cases be prevented from enforcing a right of recourse against his principal, to which he might otherwise be entitled—**Sheffield Corporation v. Barclay** (1905), A.C. 392, 397, 399. His Honour was accordingly of opinion that the defendant company, acting *bona fide,* was entitled to be placed in the same position as the bailiff, in respect of the sale of chattels of the Pairama Keena Estate in mistake for the chattels of Ben Pairama, and that the Act of sale was in the circumstances, to be regarded as having been done in pursuance of the Act. There was no evidence to support the contention that the defendant company had not acted in good faith. His Honour found, therefore, that the defendant company was entitled to the benefit of Section 183.

Plaintiff nonsuited.

Solicitors for plaintiff : **Wynyard, Wilson, Vallance and Holmden,** Auckland.

Solicitor for defendant Company : **A. Hanna,** Auckland.

Solicitors for defendant Maiden : **Russell, McVeagh, Bagnall and Macky,** Auckland.

Smith, J. September 27 ; October 5, 1928. Wellington.

MAXWELL v. SALMON, MANNING & MAXWELL.

Destitute Persons — Practice — Maintenance — Enforcement o Orders Made in Supreme Court and Registered in Magistrate' s Court—Decree Absolute Granting Custody of Child Subject to Conditions Set Out in Agreement Between Parties—Agreement Providing for Maintenance of Child—Sealed Copy Decree Registered in Magistrate's Court—Certified Copy of Copy of Agreement Sealed with Seal of Supreme Court Annexed to Decree—Agreement Not Part of Order—No Jurisdiction to Enforce Order Not Showing Amount to be Paid—Destitute Persons Amendment Act 1926, Section 8.

Motion for a writ of prohibition or alternatively a writ of injunction or writ of certiorari to restrain the defendant Magistrate (Mr. J. H. Salmon, S.M.) from summarily enforcing payments of maintenance under a decree absolute purported to be registered in the Magistrate's Court pursuant to Section 8 of the Destitute Persons Amendment Act, 1926. The decree absolute was made on 21st May, 1926, and, by agreement of the parties contained a provision that custody of the child of the marriage (named) be granted to the respondent "on and subject to the conditions set out in the agreement between the parties dated 13th November, 1925, and filed in the cause." The agreement was not incorporated in the decree or annexed thereto as part of the decree. It contained a provision (Clause 3) that the husband should pay to the wife for the maintenance and education of the child the sum of £2 per week, payable monthly. The husband failed to keep up the payments, and the wife purported to register the decree in the Magistrate's Court pursuant to Section 8 of the Destitute Persons Amendment Act, 1926, for the purpose of obtaining the summary enforcement thereof. Various payments were enforced thereunder and an application to enforce further payments was pending in the Magistrate's Court at the date of the present action. The defendant Magistrate had held that he had jurisdiction to enforce the payments.

Fitzherbert for plaintiff.

P. W. Jackson for defendant E. V. Maxwell.

SMITH, J., said that counsel for plaintiff had urged that the decree absolute related to custody only, and not to maintenance, and the word "conditions" had a limiting effect. His Honour was satisfied that, on the true construction of the agreement, the payment of maintenance was one of the conditions as to custody. Section 8 of the Destitute Persons Amendment Act, 1926, however, in His Honour's opinion, required that the payment of the weekly or monthly amount must be part of the order of the Supreme Court. When drawn up, that order should, of itself, show the payments. The Section authorised a copy of that order and of that order only, under the seal of the Supreme Court, to be sent to the Magistrate's Court. It did not authorise the forwarding of any document referred to in the order, unless it was part of the order as drawn up. In the present case the copy of the decree registered in the Magistrate's Court was endorsed by the Deputy Registrar "Certified true copy," and it was duly under the seal of the Supreme Court. It did not show the payment required by the agreement. Annexed to the copy of the decree, but not forming part of the decree, was a copy of a copy of the agreement between the parties, upon which was endorsed a certificate by the Deputy Registrar of the Supreme Court that the document was an exact copy of a copy of an agreement filed in Divorce No. 2819 Maxwell v. Maxwell. The seal of the Supreme Court was placed on each page of that copy of a copy. In His Honour's opinion, Section 8 did not authorise the Magistrate to look at any document save the duly certified copy of the Supreme Court decree. As that document did not show the amount to be paid, the document was not an order within the meaning of Section 8 of the Destitute Persons Amendment Act 1926. The Magistrate had, therefore, no jurisdiction to enforce the order.

Writ of Prohibition granted.

Solicitors for the plaintiff : **Johnston, Beere & Co.,** Wellington.

Solicitors for the defendant Maxwell : **Wilford, Levi and Jackson,** Wellington.

Smith, J. October 1 ; November 13, 1928. Auckland.

IN RE CORLEY : DIGNAN & MAHONY v. SCHWARTZ AND CORLEY.

Will—Interpretation—Gift of Income to Four Named Children Equally—Provision that if any Child Should Die Before Testator Leaving Issue, such Issue Should Take the Parent's Share, and if any Child Should Die Before Testator Leaving No Issue, the Share of Such Child Should be Divided Equally Between the Surviving Children—Death of Two Children After Testator One Leaving and One Not Leaving Issue—Surviving Children Not Entitled to Shares of Such Deceased Children—Cross Limitations Not Implied—Partial Intestacy.

Originating summons for the interpretation of paragraph 4 of the will of James Corley, deceased. That paragraph provided that the trustees should invest the proceeds arising from the conversion of his real estate and divide the net income arising therefrom equally between the testator's named children and "in case any of my said children should die before me leaving issue him or her surviving the share of income to which the child so dying shall be entitled shall go wholly to the issue of the

child so dying if only one and if more than one shall be divided equally between such issue and in the event of either of my said children dying before me and leaving no issue him or her surviving then I DIRECT that the share of income to which the child so dying would have been entitled shall be equally divided between the surviving children or paid wholly to the survivor as the case may be." The testator then directed that "upon the death of the survivor of my said children" the monies invested should be held in trust for the children then living of his sons and daughters in equal shares, such shares to be paid over to each grandchild on his attaining 21, and further provision was made in the event of there being, at the death of the survivor of the testator's children, no issue of such children then living. The will was made on 17th November, 1908. The testator died on 1st October, 1910, leaving four children, namely, Margaret, Mary Anne, Winifred, and James Corley, all of whom had at the testator's death attained 21. Of those children, Margaret Corley died on 17th January, 1919, without leaving issue; James Corley died on 27th November, 1927, leaving him surviving a daughter who had then attained 21. The present proceedings were instituted to determine whether the two surviving children were entitled from and after the death of James Corley, during their joint lives to the whole of the net income arising from the realisation of the real estate, or, if not, which persons were entitled to such income.

Mahony for plaintiffs and Winifred Jane Corley, a granddaughter of deceased.

McVeagh for defendants.

SMITH, J., said that it seemed clear that the use of the word "either" in the phrase in paragraph 4 "in the event of either of my said children dying before me" meant "any." The gift of income was to named children. There was a specific limitation of the income in two events, viz.: (1) in the case of a child dying before the testator leaving issue, in which case the issue took the parent's share; (2) in the case of a child dying before the testator leaving no issue, in which case the income to which the child was entitled was to be equally divided among the surviving children or paid wholly to the survivor as the case might be. If the first event had occurred, then the persons entitled to the income would have been the surviving children taking *per capita* and the issue of the deceased child taking *per stirpes*. The gift to the issue of the deceased child would properly be read as a substitutional or original gift. Such beneficiaries would not, in His Honour's opinion, take the income as joint tenants. A joint tenancy would certainly be severed as to the share of such a deceased child, which would be held *per stirpes*. Furthermore, the testator made specific provision for the case of a child dying before him leaving no issue. The share of such a child was directed to be divided equally amongst surviving children or paid wholly to the sole survivor, thereby excluding the stock of a deceased child dying before him, although they might be included in the original takers. His Honour thought that the intention of the testator was to regard the beneficiaries of the income as tenants in common, and that there was no right of survivorship implied in the gift of income to the original beneficiaries thereof taking on his death.

If the gift of the income were considered from the point of view of implying cross limitations in favour of the original takers as tenants in common in respect of the share in the income of a child dying after the testator, it was necessary first to ascertain from the will the intention of the testator as to the disposition of that child's share of income. Cross limitations were implied only for the purpose of carrying out the testator's intention: per Turner, L.J., in **Atkinson v. Barton,** 3 D.F. & J. 339; **Theobald on Wills** (6th Edn.) 710. It seemed to His Honour impossible to say what was the intention of the testator in such an event. He provided that in the event of a child dying before him leaving issue, the issue were to take the share of the income to which the parent would have been entitled. He provided that in the event of a child dying before him not leaving issue, his own surviving children were to take the share to which that child would have been entitled. His Honour was unable to say whether in the event of a child dying after the testator leaving issue, the stock of a child dying before the testator were intended to participate or not; nor whether in the event of a child dying after the testator without leaving issue, his surviving children only were intended to take to the exclusion of the stock of a deceased child dying before him. No help was to be gained from the rest of the will. When the gift over of the capital invested took effect, all the grandchildren shared equally *per capita*. There were two technical difficulties in the way of implying any cross limitation in favour of the survivor of the original takers of the income. Those difficulties were specified in the reasoning of Parker, J., in **In re Hobson,** (1912) 1 Ch. 626. Firstly in cases where cross limitations had been so implied, the gift over had taken effect upon the death of the survivor of the original takers. That would not have been the position in the present case, if a child had died before the testator leaving issue. Such issue would have participated *per stirpes* as original takers; yet the gift over was on the death of the survivor of the testator's own children. In those circumstances there appeared to be no authority for the implication of a cross limitation in favour of the survivors of the original takers. Secondly, if the intention were that the stock of a child dying before the testator were to participate in the share of the income of a child dying after the testator, the cross limitation would require to be in favour of certain persons taking *per capita* and certain persons taking *per stirpes*, i.e., the survivorship would have to be construed as including survivorship by stocks. Parker, J., doubted whether survivorship could be properly construed in that way, and with much deference, His Honour shared that doubt. In His Honour's opinion, the present was not a case in which on principle or authority a cross limitation could be implied. His Honour was, therefore, obliged to conclude that there was a partial intestacy. The Court would avoid, if it could, a construction involving any intestacy, but in the present case, setting aside for the moment the technical difficulties, His Honour could avoid it only by speculating as to the testator's intention, and His Honour was not at liberty to do that. The same kind of difficulty was felt by the Court in **In re Hobson,** (*cit. sup.*) and in **In re Mears,** (1914) 1 Ch. 694, in both of which cases the Court held that a partial intestacy had arisen. His Honour accordingly held that the share in the income of any child dying after the testator whether leaving issue or not was undisposed of by the will from the date of the death of such child down to the date of the death of the survivor of the testator's children, when the gift over took effect.

Solicitors for plaintiff: **Mahony, Dignan and Foster,** Auckland.

Solicitors for defendant: **Russell, McVeagh, Bagnall and Macky,** Auckland.

Court of Arbitration.

Frazer, J. October 15, 1928.
Dunedin.

CALDER v. DOUGLAS.

Workers' Compensation—Adjoining Farmers Assisting Each Other—Seasonal Occupation—Harvesting—Remuneration—Relationship of Master and Servant Established—Mode of Calculation of Average Weekly Earnings.

Claim for compensation under the Workers Compensation Act, 1922. The parties who were adjoining farmers at Ardgowan, had by arrangement for many years assisted one another at busy seasons of the year. Payment varied with current wages for the particular type of job and at the time of the accident was at the rate of 2/- per hour. The accounts were settled by striking a balance of time at the end of the work, and the man in whose favour the balance stood received payment at the rate of 2/- per hour. The defendant in the season in question worked on the plaintiff's farm until harvesting was finished, and the plaintiff then went to work for the defendant. He worked for the defendant on Monday, Tuesday, and Wednesday of one week, and on the Monday of the following week when he was injured by an accident as the result of which he lost his right eye. The evidence showed that the parties were in the habit of taking one of their men with them to work upon the other's farm, but that this man was generally paid directly by the farm owner. The parties usually also took a team with them, but were never paid team rates. The farm owner had the right to indicate where the stacks should be placed, and to say to what size they should be built, whether or not work was to be done on any particular day, and when work was to be commenced and finished, which end of the field was to be stacked first, and the particular job each man was to do. Either party could have dismissed the other party, and the arrangement was one of convenience owing to the difficulty in getting labour. Both parties worked on their own farms for the greater part of the year, and only occasionally took on casual labour for harvesting, ploughing and other seasonal farming occupations. Morning and afternoon luncheon and midday dinner were supplied by the farm owner at the stacks.

Adams for plaintiff.

Callan for defendant.

FRAZER, J., delivering an oral judgment, held on the facts that the relationship of master and servant existed between the defendant and the plaintiff. **Goulden v. Burke,** (1926) N.Z.L.R. 459, was distinguishable. As to the plaintiff's average weekly earnings, the plaintiff spent the great bulk of his time upon his own farm, but the evidence, which was uncontradicted, and which there appeared to be no reason to disbelieve, showed that he worked for adjoining farmers at busy seasons upon the same footing as that arranged with the defendant. A normal week's wages at harvesting would consist of approximately 48 hours. Following the decision in **Livingstone v. Westport Stockton Coal Co., Ltd.,** 14 G.L.R. 515, the Court held that the proper course was to have regard to the earnings for a normal week's work. The plaintiff's average weekly earnings were, therefore, held to be 48 hours at 2/- per hour, and the value of the food supplied was fixed at 12/6 per week, giving total weekly earnings amounting to £5/8/6. The plaintiff was awarded full compensation on that basis for five weeks (being the period of total incapacity) and 50% as per schedule for the remainder of the period of liability.

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

Frazer, J. October 26, 1928
Greymouth.

CASEY v. GREY COUNTY COUNCIL.

Workers Compensation—Dependency—Partial or Total—Sister Keeping House for Deceased—Entirely Dependent on Earnings of Deceased—Able to Earn Living—Two Brothers from whom Contribution Might have been Obtained—Existence of Possible Legal Rights Against Brothers Irrelevant—Ability to Earn Own Living Immaterial—Claimant a Total Dependant.

Action by the plaintiff a sister of the deceased worker to recover compensation as a total dependent of the deceased. The plaintiff kept house for the deceased and was entirely dependent upon his earnings. For 20 years, except for an interval of 10 months, between December, 1926, and October, 1927, when she went out to service, she had acted as housekeeper for the family. Her father died in 1910, and her mother in September, 1926. A married sister died in 1928, leaving a child and the then members of the household, consisting of the plaintiff, the deceased, and their mother, took charge of this child, who lived with the plaintiff and the deceased until the latter's death, and was provided for by the deceased. The plaintiff had two other brothers, who did not live at home, nor did they contribute to her support. The plaintiff was 37 years of age, and had never been married. Shortly after her mother's death, she decided to earn her own living, and went out to domestic service. The deceased, however, found it difficult to arrange for his own housekeeping and to look after their niece, who was then ten or eleven years of age, and he asked the plaintiff to resume her old position in the house, which she agreed to do. The deceased paid her no wages, but gave her £5 to £6 a fortnight for housekeeping purposes, out of which she was able to provide for her clothing and other necessaries. On the death of her mother, the plaintiff became entitled to a fourth share of her estate, the principal item of which was the house in which the family lived. The house, however, was encumbered to its full value, and the estate as a whole was in debt. The plaintiff had no other property or income.

Hannan for plaintiff.
Wilding for defendant.

FRAZER, J., delivering an oral judgment, said that the issue of dependency in all cases, except those specially provided for in Section 4 (2) of the Act was one of fact. The observations of Lord McLaren, in **Rintoul v. Dalmeny Oil Co., Ltd.** (1908) S.C., 1025, disposed of the contention that the existence of possible legal rights against the other two brothers could have any bearing upon the actual dependency of the plaintiff upon the earnings of the deceased brother. She had made no claim upon them, and in the circumstances it was unnecessary for her to do so. His Honour distinguished **Hocquard v. Thos. Ballinger and Co., Ltd.,** 15 G.L.R. 379. There was nothing in the evidence from which a contractual relation between the deceased and the plaintiff could be inferred. It was purely a family arrangement, without any element of contract, and there was no suggestion that it was intended to be of a temporary nature.

The question as to the effect, in a claim based on total dependency, of proof that the plaintiff was capable of earning her own living was authoritatively settled by **Simms v. Lilleshall Co., Ltd.,** (1917) 2 K.B. 368, where it was held that in fact there was total dependency at the time of death, it was immaterial whether the dependant was capable of earning anything. His Honour referred also to **Moyes v. Wm. Dixon Ltd.,** 42 S.L.R. 319. The Court was satisfied, on the evidence, that the present plaintiff, though capable of earning her own living, was in fact totally dependent upon the earnings of her deceased brother, and that no contractual relation existed between them. The Court, therefore, had no jurisdiction to determine what amount of compensation was reasonable and proportionate to the monetary loss she had suffered, but was bound to award compensation on the arbitrary basis set out in Section 4 (1) of the Act.

Solicitors for plaintiff: **Hannan and Seddon,** Greymouth.
Solicitors for defendant: **Wilding and Acland,** Christchurch.

Frazer, J. November 8; 23, 1928.
Christchurch.

BUCHANAN v. BROSNAN.

Workers' Compensation—Injury to Eye—Remaining Degree of Vision in that Eye Useless Without Aid of Correcting Glass—Basis of Compensation—No "Total Loss of the Sight of one Eye."

The plaintiff was an electrician, whose left eye, while he was working on a magneto in the course of his employment with the defendant, was injured by a piece of steel which flew off the magneto. An operation was performed, by which the piece of steel and the lens of the eye, which had become cataractous, were removed. The plaintiff had useful vision in the left eye, provided a suitable correcting glass was used, but there was evidence to show that the eye, unaided, had only 1–60 normal vision. Such a degree of vision was, for industrial purposes, useless to the plaintiff, though it would enable him to become aware of objects on his left side, which could then be seen clearly when looked at with the right eye. The use of a correcting glass would enable the plaintiff to make use of both eyes simultaneously, for objects would appear to the two eyes to be unequal in size, and he would be confused. The plaintiff claimed compensation as for the permanent loss of the sight of one eye.

Sargent for plaintiff.
Cuthbert for defendant.

FRAZER, J., said that counsel for the plaintiff submitted that the present case was analagous to that of a man who having lost a foot was admittedly entitled to schedule compensation for the loss of that foot even though he could go about his work with the aid of an artificial foot and earn full wages. For the plaintiff's claim to succeed, however, it must come within the words used in the Second Schedule, "the total loss of the sight of one eye." It appeared to His Honour that the analogy sought to be established between the use of an artificial foot and the use of a glass was unsound. In the former case the man suffered the total loss of his foot, and so brought himself within the words of the second Schedule, for the artificial foot was only a substitute for the foot he had lost. In the present case, the plaintiff had not lost the sight of his eye. The sight was still there, though an artificial aid was necessary to make it useful. The glass was an aid to the eye, not a substitute for it. Nobody would think of saying that a man had totally lost his sight, if, with the aid of glasses, he could see well enough for all practical purposes. In His Honour's opinion, the plaintiff's case did not come within the second Schedule, and he could, therefore, claim compensation only for actual loss of earning power.

Solicitors for plaintiff: **Slater, Sargent, Dale and Connal,** Christchurch.
Solicitor for defendant: **R. A. Cuthbert,** Christchurch.

Hire Purchase Agreements and Mechanics' Common Law Liens.

A Recent Decision of the High Court of Australia.

In our issue of July 24th last, reference was made to the recent decision of the Victorian Full Court in *The Automobile Finance Co. of Australia Ltd. v. Fisher*, (1928) V.L.R. 131, and the case was also cited and discussed in Mr. F. C. Spratt's article on "Hire Purchase Agreements and Mechanics' Common Law Liens" in our issue of 2nd October. Briefly, the facts in that case were that the hirer of a motor truck under an agreement of hire-purchase which expressly stipulated that the hirer should have no authority to create a lien upon the vehicle in respect of any repairs to it without the knowledge of the owner (the plaintiff) left it with the defendant to be repaired. The defendant, who did not know that the hirer was not the owner, executed the repairs. The hiring having been determined by the hirer's default, the owner demanded delivery of the truck; but the defendant claimed to be entitled to retain it under a lien until paid for his work. The Full Court held that the fact that an artisan had *bona fide* expended labour on a chattel did not entitle him to retain it against all the world until he was paid for his labour. If he did the work at the request of a person in possession of a chattel who was not the owner, he had a lien upon the chattel available against the owner only if he could show the authority of the owner to have the work done; such authority might be given by express or implied agreement, or the owner might be estopped by his conduct from denying the authority. In the circumstances of the case no such authority could be inferred and no estoppel arose; therefore there was no lien.

In view of the obvious conflict between this case and the decision of MacGregor, J., in *Moyes v. Magnus Motors Ltd.*, (1927) N.Z.L.R. 906, (the other cases bearing upon the point are collected and discussed in Mr. Spratt's article) it is of particular interest to note that five Judges of the High Court of Australia (Knox, C.J., Isaacs, Higgins, Gavan Duffy, and Starke, JJ.) have unanimously upheld the decision of the Full Court of Victoria—see (1928) V.L.R. 496.

Moyes v. Magnus Motors Ltd. (*cit. sup.*) was cited in argument. The judgment of Knox, C.J., Gavan Duffy, and Starke, JJ., is, all things considered, somewhat shorter perhaps and less closely reasoned than the importance of the question demanded: it reads—

"The Supreme Court of Victoria held that the plaintiff was not entitled to an artificer's lien. The rule of law is that an artificer's lien only arises when 'the work in respect of which the charges arose was done by the order or at the request of the owner or some person authorised by him.' *Cassils and Co. v. Holden Wood Bleaching Co., Ltd.* (1914) 112 L.T. 373; *Pennington v. Reliance Motor Works Ltd.* (1923) 1 K.B. 127; *Hall on Possessory Liens*, p. 57; *Keen v. Thomas* (1905) 1 K.B. 136; *Green v. All Motors Ltd.* (1917) 1 K.B. 625; and *Albemarle Supply Co. Ltd. v. Hind and Co.* (1928) 1 K.B. 307, are all cases in which such an authority was inferred. The learned Judge of the Supreme Court declined to draw any such inference in the circumstances of the present case, and in our opinion they were right."

The judgments of Isaacs, J., and Higgins, J., are in this respect more satisfactory; both of the learned Judges dealt in detail with the authorities and distinguished *Albemarle Supply Co., Ltd. v. Hind and Co.* (1928) 1 K.B. 307, as being decided upon the grounds of apparent or implied authority.

Unless, therefore, what would appear to be the improbable happens and the case is both carried to the Privy Council and there reversed, it would appear that *Moyes v. Magnus Motors Ltd.* (*cit. sup.*) must now be definitely regarded as wrongly decided.

Wanganui District Law Society.

Annual Meeting.

At the annual meeting of the Wanganui District Law Society, the following officers were elected:—

President: Mr. W. A. Izard. Vice-President: Mr. W. H. MacLean (Taihape). Council: Messrs. N. R. Bain, C. P. Brown, H. M. Keesing, L. N. Ritchie (Raetihi), W. J. Robertson, and V. B. Willis. Treasurer: Mr. G. W. Currie. Auditor: Mr. C. H. Clinkard.

The question of Christmas Holidays was considered and it was decided to close on the evening of Friday, 21st December, and to re-open on the morning of Wednesday, January 9th.

Ruling of Council.

The following questions were submitted recently for the Council's ruling:—

(1) "On the reduction of a mortgage, is the Solicitor for the mortgagor entitled to prepare the statutory Memorandum of Reduction?"

(2) "If the answer is in the affirmative, is the Solicitor for the mortgagee entitled to charge the scale fee provided by Section "G" of the scale?"

So far as the questions involved matters of law, the Council declined to express any opinion, but held as a matter of practice that the mortgagee's Solicitor prepares the Memorandum of Reduction and charges the fee provided by Section "G" of the scale.

A Strange Judicial Oath.

The judges of the Isle of Man take an oath on appointment which affords an interesting comparison with our own judicial oath. It is as follows:—"By this Book and the holy contents thereof, and by the wonderful works that God hath miraculously wrought in heaven above and in earth beneath, in six days and seven nights, I do swear that I will, without respect of favour or friendship, love or gain, consanguinity or affinity, envy or malice, maintain the laws of this isle justly between our Sovereign Lord the King and his subjects within this isle, and betwixt party and party, as indifferently as the herring's backbone doth lie in the midst of the fish."

"Tracing" Chattels Personal.

By H. W. ATACK.

If the property in chattels personal happens to be acquired, as is not infrequently the case, through the default of a trustee for, or a person standing in a fiduciary position to, another it is sometimes difficult to determine the legal and equitable remedies of the *cestui que trust.* The leading works on the Law of Trusts, while dealing with the rights of a *cestui que trust* in such circumstances as regards realty, contain no altogether satisfactory treatment of the position when the property affected is not realty or chattel interests in land, but chattels personal.

In an action by the *cestui que trust* against the person acquiring the property through the default of the trustee, Equity and the Common Law afforded concurrent remedies. The action for money had and received was maintainable in Courts of Law where the *cestui que trust* could attribute to the defendant the fiction of a promise to pay money that had come into the latter's hands. The limits of the action to recover money *in personam* are discussed in *Sinclair v. Brougham,* (1914) A.C. 398. Co-existent with the remedy *in personam* Equity afforded a plaintiff the right to trace the property into the hands of a third party where the relation of debtor and creditor as between the third party and the trustee had not superseded the right *in rem.* If the money or property could be traced the plaintiff was entitled to a charge on it secured by a "tracing" order—*Smith v. Cunningham,* 34 N.Z.L.R. 385. The principle is that the true owner who can trace his property has a right to recover his property because it is his, and the question of debtor and creditor does not enter into the question.

The general principle of Equity as to following trust property can be stated thus : A *cestui que trust* or other person, where there is a fiduciary relationship, can follow and recover property that has been wrongfully alienated or converted in breach of trust provided the property can be traced. The property must be capable of being traced in fact. Money must be actually existing assets traced into and remaining in a bank account. It cannot be earmarked otherwise.—*In re Hallett and Co., ex parte Blane,* (1894) 2 Q.B. 237; *Snell's Principles of Equity,* 19th Edn. 178.

There are important exceptions to the right of the true owner to follow and recover his property whether the same is real estate or a chose in possession or in action.

(1) *If the property in a chose in possession is transferred by a trustee to a bona fide purchaser for value who has no notice of the trust the latter will not be bound by the trust.* There is no equity left to the *cestui que trust* to recover the thing back from the purchaser so acquiring the legal title to it : 13 *Halsbury* 160; *Williams on Personal Property,* 28. The application of the doctrine of notice to realty transactions is clearly defined, but owing no doubt to the diverse nature of personal estate and to the fact that choses in action could only be transferred subject to all equities, its application in the case of personalty has not been so general or definite.

(a) *Property must pass.* In dealings with chattels coming under this heading, the property in the same vests in the purchaser generally by delivery although cases could arise where the property might be transferred in the thing by deed. In order to receive protection, it is necessary that the property in the money or thing in possession should have passed. If this is not the case, the prior equity of the *cestui que trust* will prevail.

The trustee has the legal estate, or legal right as it is called, and can transfer the same and give a good indefeasible title. The position is different where the property has been stolen. *Nemo dat quod non habet.* Nobody can give a better title than he possesses ; but this well known principle of law also has no application in the case of money or negotiable instruments paid or taken *bona fide* and for value without notice—see *Miller v. Race,* 1 Sm. L.C., 12th Edn., 525, and notes following ; *Moss v. Hancock* (1899) 2 Q.B., 111, 118 ; the judgment of Lord Mansfield in *Clarke v. Shee,* 1 Cowp. 197 ; *Raphael v. Bank of England,* 17 C.B. 161 ; and *Black v. Freedman and Co.,* 12 C.L.R. 105.

(b) *Value.* A volunteer is not protected and a purchaser must give valuable consideration. An existing debt is a sufficient consideration.

Collins v. Stimson, (1883) 11 Q.B.D. 142, is authority for the proposition that trust money cannot be followed if paid to a third person *bona fide*—as for instance to a tradesman in part payment of a debt. A bankrupt having disposed of his goods in fraud of his creditors opened an account in a bank with the proceeds and, having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted *bona fide* and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt. It was held that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract. "I am unable to distinguish this case from that of money paid to an ordinary tradesman who *bona fide* receives it in part payment of his debt" ; per Lopes, J., at page 144.

Ex parte Dewhurst : *In re Vanlohe,* L.R. 7 Ch. 185. Money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bankruptcy. It was held in this case that the money could have been intercepted but not followed into the hands of a third person. In refuting the argument on behalf of the plaintiff, James, L.J., said : "Where are claims of this nature to stop if this were to be allowed ? On the same principle, if the bankrupt had paid his butcher and baker out of the money, the amount of what they had received might have been recalled from them."

A trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced it by funds which under a power of attorney from his co-trustee under the other he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustee of it transferred the fund thus replaced into Court on a motion. It was held that the transfer was equivalent to an alienation for value without notice and that the *cestui que trust* under the other settlement could not follow the trust fund—*Thorndike v. Hunt,* (1859) 3 De G. & J. 563.

Northern Counties of England Insurance Co. v. Whipp, 26 Ch.D. 482. "The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a *bona fide* debt without notice is in our judgment devoid of support from principle or authority": per Fry, L.J., at page 495.

(c) *Bona fide.* The purchaser must have acted *bona fide* in the matter—*Thomson v. Clydesdale Bank Ltd.,* (1893) A.C. 282, per Lord Herschell, L.C., at 287: "No doubt if the person receiving the money has reason to believe that the person making the payment is handing over in discharge of his debts money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon." And again: "It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person paying the debt acquired the money with which he pays it." And Lord Shand in the same case said, at p. 291: "Where questions arise with third parties into whose hands the money can be traced, as in this instance, liability against them for recovery of the sum misapplied arises only where it can be shewn directly, or as the reasonable inference from facts proved, that these parties were cognizant that the money was being wrongfully used in violation of the agent's duty and obligation."

(d) *Notice.* There are numerous authorities that a banker acting in good faith and without notice of any irregularity or that the moneys are trust moneys is entitled to a first lien on all moneys paid into the client's account. But where the banker has notice that the moneys are trust moneys, he is not protected—*Ex parte Kingston*: *In re Gross,* (1871) L.R. 6 Ch. 632.

(2) *If the legal estate in or legal right to choses in action is transferred by the trustee to a bona fide purchaser for value who has no notice of the trust the latter will not be bound by the trust provided the choses in action are* (*i*) *Negotiable instruments, or* (*ii*) *Transferable at law.*

(*i*) *Negotiable Instruments.*

The general rule is that choses in action are only transferable subject to all equities. Negotiable instruments at Common Law were an exception to the rule expressed in the maxim, "*Nemo dat quod non habet.*" Also where they passed to a third party who took *bona fide* for value and without notice he was not affected by the equity of a *cestui que trust*—*Ashwin v. Burton,* (1863) 32 L.J. Ch. 196.

One of the leading cases on title to negotiable instruments is *London Joint Stock Bank v. Simmons,* (1892) A.C. 201, where the House of Lords held that a person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who had none. Lord Watson said, at p. 213: "In my opinion it necessarily follows from the negotiable character of the documents that Delmar who was lawfully in possession of them for a special purpose was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith and for value, although the transaction on his part involved a fraud upon the respondent." And the learned Judge remarked that this rule of law had met with the approval of the House in *Goodwin v. Robarts,* 1 A.C. 476, where the facts were practically the same.

Again in *Dawson v. Prince,* 2 De G. & J. 41, Turner, L.J., said: "Both upon principle and upon authority I take it to be perfectly settled, that as against a purchaser for valuable consideration without notice, having a legal title, this Court will give no relief." The Judge also discussed in this case the application of the doctrine of constructive notice to commercial transactions.

(a) *Bona fide.* The purchaser must have acted *bona fide* and he does not necessarily lose the protection of the Court through being negligent. In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of such bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of *mala fides* but is not equivalent to it—*Goodman v. Harvey,* 4 A. & E. 870.

(b) *Value.* A volunteer will not be preferred by the Court and the purchaser must show that he gave valuable consideration. As it has been seen, a debt will support a defence of purchase for value. In *Banque Belge v. Hambrouck,* (1921) 1 K.B. 321, the facts were that money was obtained fraudulently in the shape of cheques and paid into a bank. Cheques were drawn on the bank and handed to X who paid them into her private account at another bank. Held that the money could be followed into X's bank account and recovered from her as she had not given value for them.

(c) *Notice.* Notice imputed to a purchaser is fatal, but the notice has to be direct. The Courts have always fought shy of introducing the doctrine of constructive notice into transactions in negotiable instruments and into ordinary commercial dealings. "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments," said Lord Herschell in *Manchester Trust v. Furness,* (1895) 2 Q.B. 539; and in *Lloyds Bank Ltd. v. Swiss Bankverein,* 108 L.T. 143, Farwell, L.J., remarked that if the doctrine was to be applied to mercantile transactions it would be Equity gone mad. In *Thomson v. Clydesdale Bank Ltd.,* (*cit. sup.*), Lord Shand said that it had to be shown directly, or as the reasonable inference from facts proved, that the parties were cognizant of the matter.

(*ii*) *Choses in Action Transferable at Law.*

A further exception to the rule that choses in action are transferred subject to all equities is made in the case of choses in action which are capable of being transferred at law. The Courts do not talk of the legal estate in the chose in action, but of the legal right to it.

Shares in companies are choses in action transferable at law and pass to a purchaser free from all equities. It is very necessary however for the purchaser to perfect his title and get the legal estate or title transferred to him. The maxim: "*Qui prior in tempore, potior in jure est,*" otherwise applies: *Underhill's Law of Trusts and Trustees,* 8th Edn., 534. *Powell v. London and Provincial Bank,* (1893) 1 Ch. 610, is a case in point. The bank obtained a transfer of shares but, the transfer turning out to be defective, it did not get the legal estate in the shares. The prior equity therefore prevailed.

(a) *Legal Estate or Legal Right Must Be Transferred.* In *Taylor v. Blakelock,* (1886) 32 Ch. D. 560, it was argued by counsel that the property transferred was a chose in action and therefore taken subject to equities. Cotton, L.J., said at p. 567: "But that rule applies

only to a chose in action not transferable at law ; that is not the rule as regards the right to sue on a bill of exchange or promissory note. I do not at all say whether this is a chose in action within the meaning of that rule. It certainly is not one to which the rule applies, because here Blakelock has the legal right to this debenture stock, and he is the only person who has that legal right. I need not talk of legal estate, but the legal right to the chose in action, if it be a chose in action, which is at law transferable, and has been transferred to him." And in the judgment of Bacon, V.C., which was affirmed by the Court of Appeal, it is said (p. 566) : "If the chain of representation of a trust fund can be shewn to have been preserved then the trust will be effectual and whatever misapplication has taken place can be rectified by the judgment of the Court. But, on the other hand, where a trustee, however unjustly and improperly as regards his own actions, deals with a trust fund, and parts with it to another person, justly as between those two actors in the transaction, and without notice to that other person of any want of title or any infirmity of right on the part of the trustee . . . when he transfers the trust fund in the regular formal manner to that other person without notice, no instance can be referred to in which the Court has ever said that property so acquired upon such a transaction between debtor and creditor without notice can be interfered with on the ground that the debtor has misapplied money in his hands as trustee. I rely wholly on *Thorndike v. Hunt* (*cit. sup.*) as containing a distinct authority for the judgment which I feel obliged to pronounce in this case. . . . I find that both the judges in that case alluded to the circumstances of the party being a purchaser for value and without notice."

A New Zealand case of interest is *Arundle v. Rhodes*, 4 N.Z.L.R., C.A. 353. Bank shares held by an executor as part of a trust estate were registered in his own name. He duly transferred them to a third party in settlement of his own debt. It was held that they could not be followed and recovered from the third party who had taken them with no notice of the trust.

(b) *Value. Small v. Attwood*, You. 407. This case is authority for the proposition that a purchaser of a chose in action of this nature must again give value if he is to be protected.

Trial by his Peers.

Much scorn was poured a year or two ago on the proposals of a private member's Bill to introduce some kind of class distinctions on juries, to secure, for instance, that a man of the professional classes should be tried by a jury of professional men, an artisan by a jury of artisans and so forth. The practical difficulties are obvious and perhaps insuperable, but the principle is sound enough. A jury has often to balance probabilities. What is it *likely* that a man would do in given circumstances ? How can a jury composed of working men estimate the workings of, say, a doctor's or a lawyer's trained mind, or *vice versa*. We have sometimes wondered how much the jurors in a complicated financial fraud case contrive to understand of matters which qualified accountants have taken weeks to unravel. Yet they have to pronounce on the guilt or innocence of the accused to whom an adverse verdict means ruin.—" Justice of the Peace and Local Government Review."

London Letter.

Temple, London,
24th October, 1928.

My dear N.Z.,

The news about Lord Birkenhead has no doubt interested you, partly by reason of its intrinsic merit as news and partly because the subject of it has come into your affairs at least upon the literary side. So far as we are concerned it needs, at the moment of writing, to be further particularised : all that is officially known as yet is that he has left the Cabinet to go into the City. So many different destinations are laid, upon the best authority in each case, that I hesitate to disclose that which is (also upon a best authority) indicated to me. He is to edit the "Daily Telegraph" at twenty thousand a year, as I am told by one who knows the business of the new proprietors of that highly reputable journal. It may be that, by the time this reaches you, the truth will be out and my best authority proved to be no better than others who put the salary at a more modest fifteen thousand and detail the business (with an attractive vagueness) as "Shipping." But the probabilities appear to me to favour my version : I cannot conceive the reason for a valuation of our eminent lawyer, for shipping or any other business purpose, on a five figure basis and by any payer who expects to get a return on his investment ; but I can well conceive justification for such a valuation of the genius for press purposes, a little by reason of literary ability, a little more by reason of journalistic artfulness ; but most by reason of the *cachet* to be derived by the "Daily Telegraph" from having this polemical as its Chief, and of the gain to be got over rivals in the pressing competition among the Tory journals.

The news is not received here with unmixed approval and rejoicing. We would just as soon it had never happened, and so, no doubt, would you.

Two of our former Judges of the High Court, King's Bench Division, have recently died : Channell and Ridley. Neither of them was a very great Judge, and Ridley was, to be candid, almost insignificant on the Bench though he was by no means without distinction as a classical scholar. Channell was of the severely courteous type, a fine man to look upon and a fair man to address ; Ridley was quarrelsome, and, in Court, singularly unlike the genial, hospitable self out of Court. I remember well, in my early days, noting the strangeness of first being bullied almost to extinction at Assizes, and next being accorded a most charming welcome to dinner, with the Bar, at the Judge's lodgings in the same twelve hours. I remember also the incident at Birmingham, when a prisoner picked up a chair, in the dock, and hurled it at a witness, but hit the Judge It was strangest of all to observe how his Lordship, usually so harsh in his manner to the accused, and on this occasion to be expected to be at least furious, suffered the incident (which must have inflicted great physical pain upon him) to pass almost without comment from him : an example of moderation, as I thought at the time, to any man. The truth of him probably was that he felt unequal at times to his position, and that his offensiveness, if such it is to be called, was defensive. Shyness takes at times the most surprising, and misleading, form, and it is often the result of a very praiseworthy modesty. I fancy he was a very nice person indeed when you were lucky enough to know him.

I say little about Channell, because he was so simple a character (as a Judge, at any rate, and I doubt not also as a man) that he is not capable of elaboration, in prospect. We young men of the circuits certainly had the greatest respect for him, always ; it is only as we grow a little older, a little more critical and possibly a little less discerning, that we weigh his merits as a lawyer and come to the conclusion that they were not outstanding. I say "less discerning" because I fancy that the instinctive appreciation of a new mind, unaffected by technical usage, may prove ultimately to represent most correctly the common people's view ; and it is not to be forgotten that if a Judge commends himself to the people (whose assessments, in this country, are astonishingly correct in the main) he is probably a Judge of worth. Put in another way, it is at least to be suggested of Channell that, if he adds no very remarkable value to our law reports, he was a great and valuable administrator of justice in his day.

A last word as to these Judges is worth while : it is curious that of the two Ridley had at times a very considerable influence over a jury, but Channell had, most often, none. Indeed, it was remarkable how frequently juries persisted in doing exactly the opposite to that which he suggested. The explanation may be that, being a man of simplicity himself, he mistakenly supposed that a simple direction was enough ; whereas you and I well know that twelve supposedly intelligent persons become, in the aggregate, unintelligent and insensitive, and require to be told a thing half-a-dozen times in half-a-dozen different ways, if they are to understand it.

Little has happened of note in the Courts, in the first days of their sitting ; a large number of the Judges of the King's Bench are away on circuit, and those who remain in London have pronounced, as yet, no startling decisions. Rowlatt, J., has commented forcibly upon the odd circumstances that litigants, who have long waited with professed impatience for the Courts to sit, come in flocks to demand adjournment when their cases come into the list. Seven applications were made, in one day, for cases to be taken out of the Non-jury list for the moment and to be restored thereto in, say, about a fortnight's time. With each application the learned Judge grew more amazed and less willing. Mine was the seventh.

The Privy Council is sitting in two divisions, concentrating, as to both of them, on Indian appeals of which the arrears are said to be considerable. It is not known when other matters from other corners of the world are to come into the lists ; I hope it may be soon.

And lastly as to legislation : The Local Government Reform Bill is in feverishly active preparation, we are told, for the coming session, and it is of such a character and calibre, as I have intimated, that not a few of those lawyers and departmentalists who have to handle it are likely to break down physically under the strain ! It is indeed a terrific subject, in its intrinsic ramifications and in the extrinsic circumstances which it affects and by which it is affected. It is very questionable whether, or at least how, the Houses will have time to deal with it detail by detail : this Parliament can only continue in existence for a comparatively short time now, and there are many practical reasons why it should not stay out the whole of that. Add to this the complications caused by the financial business of the legislature, more complicated and harrassing at the moment than ever, and the fact that there are peculiar and extraordinary complexities as to appropriation at the end of a Parliament, and you will understand that the lot of anyone who has to control or cater for its councils is not, at the present to be envied.

I used to think that parliamentary difficulties were exaggerated, until I got a closer view. It is incredible how formidable they are : one trifling instance will demonstrate this, if it be borne in mind how limited is the actually available time, in days and hours, of each session. A division (so elaborate are the formalities) takes but little less than twenty minutes : that is to say, if the question is raised it must take over a quarter of an hour to answer it—shall we write "this" or "that" ? That these complications are self-inflicted, or at least self-preserved, is irrelevant ; his innate conservatism is a circumstance in the life of every Englishman, however radical he may call himself, over which he has the least control and which he is the least able to alter !

I apologise for so empty a letter, but there is little life in the law as yet. Not only are we but recently awake from the Long Vacation, but also there is still the Slump. I believe there is substance in the talk of a revival of industrial prosperity, but the reference is to the future, and for the present business in general is at a very low ebb. The facts and finance of unemployment at the moment would stagger people, were they realised. They will be realised shortly ; and we in our profession are suffering, and are likely for some time to go on suffering, the ill effects of trade depression. Indeed, the legal year 1928-1929 is possibly to be the worst and most difficult in our generation, and to be felt as such at large among the Bar.

Yours ever,

INNER TEMPLAR.

White Gloves.

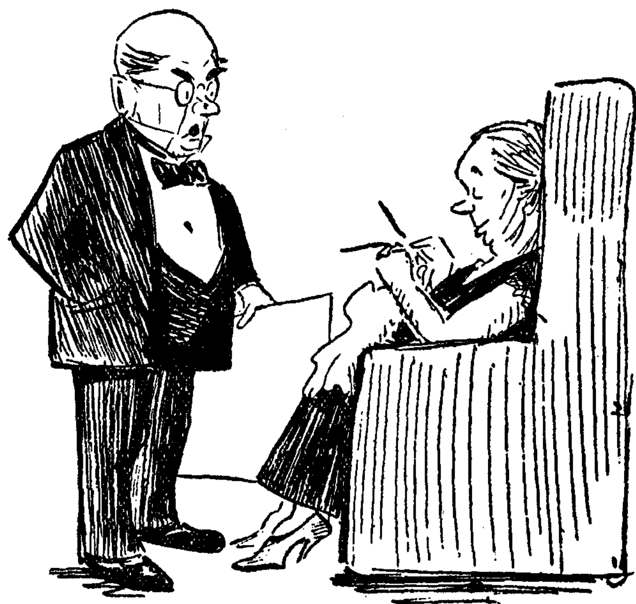
It was recently reported in the daily press that a pair of white gloves was presented to His Honour Mr. Justice Adams, at Christchurch, at the commencement of the last Criminal Sessions there, this being the first time for more than thirty years upon which such a ceremony had been performed in that city. It is, of course, no novel event for white gloves to be presented in the smaller Supreme Court centres of this country ; but in the four chief cities such occasions are rare. Indeed, from inquiries made, it would appear that no such ceremony at Wellington or Auckland can be recalled. The last occasion upon which there were no Criminal Cases for trial at Dunedin was at the sessions commencing on 7th May, 1918, but, curiously enough, no white gloves were then presented to the presiding Judge (His Honour Sir William Sim).

The practice of giving white gloves to Judges at maiden assizes is an exceedingly ancient one and is one of the few relics of that symbolism so observable in the early laws of all countries. At a maiden assize no criminal has been called upon to plead, or, to use the words of Blackstone, "called upon by name to hold up his hand." In short no guilty hand has been held up and therefore, as symbolic of the hand, gloves—white, because of the freedom from crime—are presented to the Judge.

Forensic Fables.

THE DOMESTIC TYRANT, THE CRUSHED WORM AND THE BIBULOUS BUTLER.

Mr. Justice Crasher was a Profound Lawyer, a Married Man and a Domestic Tyrant. Lady Crasher, after Filling the Role of Crushed Worm for some Forty Years, Resolved to Strike a Blow for Freedom. Her Chance soon Came. One Monday morning, after Crasher, J., had Left for the Royal Courts of Justice, an Inspector of Police Informed her Ladyship that her Butler, being at the time Intoxicated, had Pledged with a Neighbouring Pawnbroker a Silver Teapot and other Articles Bearing the Crasher Crest. The same evening Lady Crasher mentioned to her Lord and Master that she had Dismissed the Butler without Notice, or Wages in Lieu thereof, for Drunkenness and Dishonesty. Crasher, J., exhibited Violent Displeasure, and Pointed Out that the Butler would certainly Bring an Action for Wrongful Dismissal. Lady Crasher



Listened Unmoved, and did not Disclose the Strength of her Hand. When on Tuesday Morning a Dingy Person Served a Writ Upon Lady Crasher in a Suit entitled "Binns v. Crasher (Married Woman)" Mr. Justice Crasher Screamed with Passion and Insisted that the Matter must be Settled Forthwith. Lady Crasher's Quiet Reply that she would not Pay the Disgusting Wretch a Farthing and that she would fight the Case in Person Caused Crasher, J., to Use Very Ungentlemanly Language. Lady Crasher Gathered from his Remarks that she had, amongst Other Notable Disadvantages, the Temperament of a Mule and the Intellect of a Child of Seven. The Day of Reckoning Arrived and Lady Crasher Appeared in Person. Was she Defeated? Not a Bit of it. Lady Crasher Cross-examined the Bibulous Butler Inside Out, and he Never had a Look In. The Next Day the Newspapers of the Metropolis Rang with the Praises of Lady Crasher. The "Daily Howl" Contained her Portrait; the "Daily Screech" Called her "Portia Rediviva"; and the "Thunderer" had a Leader in which Lady Crasher was Thanked for the Splendid Stand she had made on behalf of the Employers of Domestic Servants. Mr. Justice Crasher took the Dignified Course of Never Alluding to the Victory which Lady Crasher had Won. But his Reign as a Domestic Tyrant was Over, and Thereafter Crasher, J., Became a Considerate and Respectful Husband.

Moral: Fight.

Correspondence.

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

Sir,

"Qui facit per alium."

The Americans have given a very clever twist to the maxim, "*Qui facit per alium facit per se*," and the twist indicates a swerve from the old English common law. Under that law the parent is not unanswerable for the independent tort of his child; but the family car has, in the hands of the boy home from school or the flapper daughter, become in America so much an engine of damage that, in order to cope with the evil, the Courts have fixed responsibility upon the parent, and so our old friend assumes a new garb and becomes "*Qui facit per auto facit per se.*"

Yours, etc.,
"COMMON LAW."

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

Sir,

Children's Courts.

I think that all solicitors practising in the Children's Courts will say "amen" to the sentiments expressed in the subjoined editorial comment of the "Auckland Sun."

> "Most of the Children's Court work has been done in an obscurity which was supposed to have been a perfect model of discretion. The general public has not been given an opportunity of studying the Court's operations. As far as the sympathetic community knows, these may have been extraordinarily good, or exceptionally bad. Nobody knows, but many people care, and are serious in their anxiety. Perhaps it will do the principals a lot of good to learn through frank and quite friendly publicity that citizens with the best cause of the child welfare movement at heart do not hesitate to say bluntly that the Children's Court in this centre of population is a sentimental farce from beginning to end. This may cause the Court to gasp in surprise and protest in quick indignation, but that, too, will contribute toward the Court's ultimate good. The time has come for candour."

But the point that I want to make just now is—and I speak subject to correction—that the lawyers of New Zealand have taken no part in the public discussions that have centred on these Courts; that we spend too much energy in formulating rules of conveyancing practice rather than in the weightier matters of law, justice, mercy, will I think be confessed by our candid members. If the Law Society has no machinery for dealing with those subjects, then I recommend this subject as one for debate at the next Conference.

Yours, etc.,
"COGNITOR."

Maintenance and Champerty.

"Ambulance Chasing" and Legal Aid Societies.

The report of a recent inquiry by the Supreme Court of New York into the practice of "Ambulance Chasing" discloses a startling and almost incredible state of affairs. The inquiry appears to have been a most extensive one; Mr. Justice Wasservogel sat almost continuously for some five months. and examined 1,100 witnesses whose testimony covers over 10,000 pages. In the course of the report it is stated: "The evidence adduced before me bears out the truth of the allegations contained in the petition of the three Bar Associations, to the effect that there exists in this Judicial Department a practice commonly known as "ambulance chasing." Personal injury cases have in the main come into the hands of relatively few lawyers, some of whom have conducted their practice purely as a business, to the detriment of the public and the profession. This condition is aptly summarised in the opinion of Mr. Presiding Justice Dowling:—

'Lawyers engaged in the practice referred to, by themselves or through their agents who are sometimes laymen, promise or give to persons sustaining personal injuries some valuable consideration to induce them to employ such lawyers to prosecute claims for damages for their injuries. Such lawyers, through their agents, in some instances maintain a well-organised and effective system of solicitation by which they obtain prompt information of accidents resulting in personal injuries from hospital employees, ambulance drivers, taxicab-drivers and others who are so situated as to have early knowledge, and they pay them compensation for such information. Solicitation for such business frequently takes place immediately after an injury has been received, often on the same day, in hospitals, in homes, and at the bedsides of injured persons, while they are in pain or otherwise distressed on account of their injuries.'

I may add that some of the "runners" who solicit such personal injury claims have even found it profitable to set up shop on their own account, and have operated a service by which they obtain from the injured person the retainer with the name of the attorney left blank, and then proceed to peddle these opportunities for employment to the highest bidder. As already indicated these methods have concentrated actions for personal injuries in the hands of comparatively few lawyers. Several lawyers have testified that they had as many as 750 to 1,000 such cases a year. The records disclose that there are a number of attorneys who average more than 500 cases a year. Cases without merit have been placed upon the calendar for their nuisance value, and have contributed to the congestion of the trial term calendars in this Department."

Apparently the practice that prevails throughout the Bar of America of agreeing to conduct litigation upon the basis of a contingent fee contributed to no small extent to these abuses. Nevertheless the report does not recommend the prohibition of the contingent fee, a course which, it is stated, "would result in a denial of justice to many poor claimants who have meritorious causes of action," but recommends that all contingent retainers in actions for personal injuries should be placed under the supervision of the Courts, and that the customary retainer of 50% should be reduced to 33⅓% inclusive, except in special circumstances, of disbursements. The adoption of a rule of practice whereby a copy of the retainer of the attorney for the plaintiff must be filed with the New York counterpart of our statement of claim, together with an affidavit setting forth how the retainer was obtained was also recommended. That such a state of affairs could ever come to prevail in England or New Zealand is, of course, if not impossible, in the highest degree improbable, and the disclosures of this report show the wisdom of our strict rule against the contingent fee.

But even in England somewhat similar abuses have crept in by reason of the operations of so-called "legal aid societies." Professional attention has been drawn to these evils in a paper read by Mr. E. R. Cook at the Law Society's recent Provincial Meeting. Legal aid societies, of course, make it their business to take up cases (generally, but not exclusively, accident cases) upon the terms that they are to receive a percentage upon any sum recovered. A recent report of Mr. Justice Finlay's Committee on Legal Aid stated that several of these societies had been detected in highly undesirable practices, and that there were the strongest reasons for suspecting that they were in most cases merely devices used by solicitors to obtain work.

Since the report was issued the case of *Wiggins v. Levy* has been decided. The circumstances of that case were that an action for damages for personal injuries had been commenced by a man in humble circumstances against the driver of a vehicle. The plaintiff was maintained by a legal aid society on the understanding that a percentage of any damages recovered should be payable to the society in return for its assistance. The defendant was not himself insured, but his employers were; and the insurance company defended the action in the driver's name and obtained judgment for costs against rhe plaintiff. The insurance company, then again in the driver's name, commenced proceedings for damages for maintenance and champerty against the solicitor for the legal aid society, alleging his complicity in the percentage arrangement. The jury found that maintenance and champerty had been proved, and judgment was entered by Branson, J., against the solicitor for damages to the amount of the unpaid costs in the original action. From this judgment the solicitor appealed, and the Court of Appeal allowed his appeal on the technical ground that as the plaintiff driver had not personally been insured by the insurance company they had no rights by subrogation in respect of the unpaid costs they had paid. The Court of Appeal held, however, that the jury had been justified in their finding of maintenance and champerty against the solicitor. The Master of the Rolls pointed out that when a solicitor acts in good faith and takes pains to discover whether there is a good cause of action, it is permissible for him to take up a case for a poor person who has no money. He said it was hard to define the exact terms on which a solicitor might take up such a speculative case, but that it was a travesty to compare such cases with the action of the appellant in the case with which he was dealing.

Mr. Cook refers to this case in his paper and says that the methods adopted by legal aid societies of this type are far reaching. The agents employed are importunate and the profits realised considerable. No sufficient notice is given to the injured client of his liability for costs to the defendant if he fails in the action and claims are made without due regard to the possibility of substantiating them. It must not be

(continued at foot of p. 341)

Bench and Bar.

His Honour Mr. Justice Reed will be absent from New Zealand, on leave of absence, during 1929. His Honour Mr. Justice Herdman will be resuming his duties on the 1st February next.

The new Attorney-General (Hon. T. K. Sidey) was born in Dunedin, and was educated at the Otago Boys' High School, and at the Otago University where he took the degrees of B.A. (1885) and LL.B. (1889). He received his early legal training in the office of Mr. Saul Solomon, K.C., and was admitted as a Barrister and Solicitor in 1888. He shortly afterwards commenced practice on his own account in Dunedin, and later took into partnership Mr. E. E. Collier. The Hon. Mr. Sidey was unsuccessful in his first Parliamentary candidature, but was returned for Caversham at a by-election in 1901 ; he was successful in retaining the Caversham seat until his retirement last year. Among the public offices which Mr. Sidey has held may be mentioned those of Councillor and Mayor of the Caversham Borough, Chairman of the Otago High Schools' Board of Governors, and Vice-Chancellor and Chancellor of the University of Otago.

The new Minister of Justice (Hon. T. M. Wilford) was born in Wellington, in 1870, and was educated at Christ's College, Canterbury. He was admitted to the Bar in 1891 and is now senior partner in the firm of Wilford, Levi & Jackson, Wellington. The Hon. Mr. Wilford was defeated for the Wellington Suburbs seat in 1893, by the late Dr. A. K. Newman, and, when he defeated the Hon. T. W. Hislop for that constituency in 1896, he was unseated ; in 1900, however, he succeeded in being elected. In 1903 he was returned for the Hutt constituency and has retained that seat against numerous opponents ever since. In the course of his political career Mr. Wilford has been Chairman of Committees, Leader of the Liberal Party and as such Leader of the Opposition, and he was Minister for Justice in the Coalition Cabinet. He has been Mayor of Wellington and Chairman, and for ten years a member, of the Wellington Harbour Board. He is also a prominent figure in sporting circles.

Mr. W. G. Riddell, S.M., principal Magistrate in Wellington, and second senior Magistrate in the Dominion, has retired from office after twenty-four years on the Bench.

Mr. Riddell was born in Otago, and received his education at the Sandy Mount School, the Dunedin Normal Training College, and at the Otago University, where he gained his B.A. degree in 1889 and his M.A. degree, with honours in political science, the following year. In 1898 Mr. Riddell was admitted as a barrister and solicitor, and he lectured in jurisprudence for a period at the Otago University. He received his legal training in the office of Duncan and MacGregor, at Dunedin. Subsequently appointed relieving Stipendiary Magistrate, he sat in various parts of the country, including Christchurch, Auckland, Wanganui, and Dunedin. In June, 1907, he was transferred to Wellington. In October, 1913, Dr. M'Arthur, then principal Magistrate at Wellington, died, and on 1st January, 1914, Mr. Riddell was appointed principal Magistrate, which position he has held with conspicuous ability ever since.

Throughout his term of office at Wellington, Mr. Riddell has been chairman of the Wellington and Hutt Licensing Committees, and is also chairman of the Tramways Appeal Board. He has sat on various Commissions of Inquiry, and he has also conducted many nautical inquiries.

At a full and representative gathering of Wellington practitioners at the Magistrate's Court, last week, high and well-merited tributes to Mr. Riddell were expressed on behalf of the Profession by Mr. H. F. Johnston (President, Wellington District Law Society), and also on behalf of the Police.

In consequence of the retirement of Mr. W. G. Riddell, S.M., from the Magisterial Bench, some transfers and a new appointment have been made. Mr. E. Page, S.M., becomes Senior Magistrate at Wellington ; Mr. J. S. Barton, S.M., is to be transferred from Wanganui to Wellington ; Mr. J. H. Salmon, S.M., of Wellington, will be transferred to Wanganui. Mr. T. B. M'Neil, lately a partner in the firm of Kelly & M'Neil, Hastings, has been appointed to the Magistracy, and will be stationed at Wellington ; he will take up his duties there almost immediately.

The following admissions have been made recently at Wellington : Messrs. M. F. Grogan and C. B. Walker (Barristers) ; Messrs. G. Gray, and W. E. Wilson (Solicitors).

Mr. F. W. Course, of the firm of Speight and Course, Hamilton, has been admitted as a Barrister.

Mr. W. P. Fennell, of Auckland, has been admitted to the Bar.

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supposed that only poor people received legal aid circulars. Mr. Cook gave it as his belief that such a circular or some communication, oral or written, is, or until recently, was received by every person who had sustained an injury which could by any means or to any degree, however slight, become known publicly. Many who had received the offer and had left themselves in the legal aid society's hands could easily have afforded to consult a solicitor.

Rules and Regulations.

Animals Protection and Game Act, 1921-22.—Open season for deer-shooting in the Waitaki and Lakes Acclimatization Districts.—Gazette No. 91, 6th December, 1928.

Land Act, 1924.—Amended regulations regarding purchase of the fee simple of the land comprised in leases in perpetuity. Regulation of 31st January, 1916, revoked.—Gazette No. 91, 6th December, 1928.

Turkey. Notification by Minister of Internal Affairs re authentication of powers of attorney and other documents intended for use in Turkey.—Gazette No. 91, 6th December, 1928.

Legal Literature.

Liability of Property Owners and Occupiers for Accidents.

By WILLIAM FINDLAY: pp. 362: Sweet & Maxwell, Ltd.

The appearance of this work is particularly welcome for it covers a branch of the Law to which no separate English text-book has yet been devoted. The law embodied in this volume comprises not only the relations of landlord and tenant, so far as they apply to the incidence of their respective rights and liabilities in case of accident, but also to numerous relationships with third parties such, for example, as independent contractors, visitors, invitees, trespassers, passers-by, children and neighbouring owners and occupiers. This branch of the law is one where the differences between the law in England and the law in New Zealand are but slight; indeed, as the author points out, although the tests of liability are sometimes expressed in one country in different terms from those of others, it is not too much to say that the rules applicable to the right to, and liability for, reparation are substantially the same throughout the English-speaking world. This fact has no doubt led Mr. Findlay to cite American and Dominion cases throughout his treatise, but this reviewer would nevertheless have preferred to have seen slightly less importance attributed to the American decisions. The illustrative value of the decisions of American Courts is one thing—their authoritative value is another. Some half a dozen New Zealand cases are referred to and prominence is given to *Connor v. Howden*, (1924) N.Z.L.R. 181, (the author, however, refers to Hosking, J., as Howden, J.) and to *Nystrom v. Cameron*, 9 N.Z.L.R. 413; (1893) A.C. 308.

Mr. Findlay has given us a most able treatise on a complicated and important branch of the law.

Manual of the Law of Evidence.

Fourth Edition: By S. L. PHIPSON, M.A.: Sweet & Maxwell Ltd.

Most students would find it impracticable to read through Phipson's Law of Evidence which is as exhaustive as any practitioner could reasonably desire. The "Manual" however gives to the student all that is really essential to him for examination purposes and provides an excellent introduction to the author's larger work. The subject is treated under three headings: "Production of Evidence," "Admissibility of Evidence," and "Effect of Evidence." Naturally the most important of these is "Admissibility," and this the author has further subdivided under "Facts," "Witnesses," and "Documents." At the end of each chapter the leading cases on the subject dealt with in the chapter are summarised and classified to show clearly when evidence was held admissible and when similar evidence was held inadmissible. This method enables the student to use the book without reference to any other work for the facts of the leading cases.

Although there are under three hundred pages in the whole work there appears to be no question of general principle which does not receive mention. Occasionally lack of space has resulted in explanations being so brief that they are not very easily followed, but the effect of this is counteracted by frequent reference to the author's larger work where matters are dealt with in greater detail. For students whose chief desire is to have a simple and clear explanation of the general principles of the law of evidence, without having to read through pages of theory and speculation upon points which have little but an academic interest, the work can be confidently recommended.

New Books and Publications.

The Secretary's Guide to the Companies Act 1928 (being Supp. to The Secretarial Handbook). By E. Westby Nunn. (Solicitors Law Stationery Society). Price 1/3.

The Rating and Valuation Act 1928 and the Rating and Valuation (Apportionment) Act 1928. By G. P. Warner Terry. (Chas. Knight & Co.). Price £1/15/-.

Cases in Constitutional Law. By D. L. Keir, M.A., and F. H. Lawson, M.A. (Oxford Press). Price £1/9/-.

Principles of the Constitutional Jurisprudence of the German National Republic. By Johannes Matthern. (Oxford Press). Price £1/7/-.

The Doctrine of Necessity in International Law. By Burleigh Cushing Rodrick. (Oxford Press). Price £1/3/-.

Woodfall's Landlord and Tenant. By A. J. Spencer. (Sweet & Maxwell). Price £2/18/-. (Thin Edition 2/6 extra).

The Yearly Supreme Court Practice 1929. (2 Volumes). (Butterworth & Co. (Publishers) Ltd.). Price £2/5/-.

A.B.C. Guide. By Stringer . (Sweet & Maxwell). Price 12/6.

The Constitutional Law of British Empire. By Minty. (Sweet & Maxwell). Price 18/-.

The Gospel and the Law. By His Honour Judge Sir Edward Abbott Parry. (Heinemann). Price 10/6.

Equity in a Nutshell. Seventh Edition. By Marston Garsia, B.A. (Sweet and Maxwell). Price 4/6.

The Trial of Socrates (with chapter on his life, teaching and personality). By Coleman Phillipson, M.A., LL.D. (Stevens and Sons). Price £1/4/-.

Criminal Receivers in the United States. By The Prison Committee of Association of Grand Jurors of New York County. (Putnam). Price 7/-.

The Development of Exterritoriality in China. By G. W. Keeton, M.A., LL.M. (Longmans). 2 volumes. Price £2/7/-.

Redman's Landlord and Tenant. Supplement to Eighth Edition. (Butterworth and Co. (Pub.), Ltd.) Price 9/-.

Journal of the Society of Public Teachers of Law. 1928. (Butterworth and Co. (Pub.), Ltd.) Price 4/6.

Rating and Valuation (Apportionment) Act. 1928. By E. M. Konstam, K.C. (Butterworth and Co. (Pub.), Ltd.) Price £1 4/-.