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

"The personal liberty of every citizen in England ultimately depends on two things: (1) the wisdom of Parliament in making laws; and (2) the vigilance of the Courts of Law in securing obedience to those laws.
—Sir John Marriott.

Vol. V. Tuesday, May 28, 1929. No. 7

Police Powers and Procedure.

Under the above heading we publish elsewhere the first portion of a summary of the Report of the Royal Commission on Police Powers and Procedure which was presented in the last days of March. The Commission was presided over by Lord Lee of Fareham. The Report is unanimous and that fact, considering the different viewpoints one might have expected its various members to take, adds to its importance. The conclusions of the Commission are sure to receive careful attention in all countries where the British system of legal procedure and police administration prevail and its recommendations will probably in all such countries be at least in part adopted.

At the Legal Conference held in Wellington at Easter, the procedure adopted by the Police in obtaining statements from accused persons was the subject of a remit and, despite some small opposition on the ground that remedy for the evils complained of could not be effectively obtained by regulation, a resolution was passed to the effect that the Minister of Justice should set up a Committee to enquire into the alleged abuses and the steps to be taken to prevent their continuance if the charges were found to be true. The report of the Royal Commission had not at this time reached New Zealand, but it was recognised that the Minister of Justice would avail himself of its findings before deciding whether a Committee was necessary and that such a Committee, if set up, would find the conclusions reached and recommendations made so general in principle and application where a similar administration existed that but little evidence beyond that of Commissioners of Police and leading practitioners in New Zealand would be required.

It is very gratifying to this Journal to find the Report stressing how necessary it is that the difficulties the Police have to contend with in the investigation of criminal offences should not be lost sight of in the perhaps more attractive task of exposing methods said to savour of third degree procedure. At the time of the Savidge case, when Police methods were being severely criticised, we expressed a hope that our traditional respect and even affection for the Police would be maintained and urged that efforts should be made not to destroy but to foster such ties. It is pleasing, therefore, to find the Commission recommending "not a multiplication of regulations to hamper a constable," but "a sound grounding in the spirit and tradition of his office and in the general knowledge essential for the performance of his normal duties." If this course is adopted and members of the public adopt the advice of the Commission and, rather than voice their dissatisfaction whenever the smallest mistake or error of judgment is committed by any individual member of a large force, give more weight than they do to the trials and perplexities which beset the ordinary constable, the former happy relations existing between public and police will be restored. With the general conclusion of the Commission that it has formed a very favourable opinion of its conduct, tone, and efficiency there will be general public agreement at Home and also, we believe, with the comment of the English Law Journal, that "the marvel is that the average constable is able to perform all the duties which are cast upon him and remain as he does, unperturbed and cheerful." In our opinion if a similar inquiry is made in New Zealand the same favourable conclusions will be reached.

Though, however, the general conclusion of the Commission is in favour of the Police Force it makes many specific recommendations designed to safeguard the subject accused of a crime or from whom information is sought in regard to a crime committed. Those recommendations, relating as they do to the warnings to be given before questions are put, the taking of statements, and the presence of a solicitor or friend to assist the accused or person interrogated, deserve the most careful consideration by those responsible for the conduct of any police force. The advisability of adopting all or any of such recommendations is to be determined only after due regard is paid to the rights and liberties of the subject and the interests of Justice: but, while the rights and liberties of the subject can be easily defined, the extent to which a subject can be harried in the investigation of a crime is a practical question which will not be best answered by too many formal rules framed to meet the circumstances of a police and public mutually distrustful. The public are not generally aware that at Common Law a policeman is only a person paid to perform, as a matter of duty, acts which, if he were so minded, he might have done voluntarily. Recognition of that fact might, however, convince the public that the police are, as the Commission observes, exceptionally dependent upon the sympathy of the general public if they are to carry out their functions properly, and induce them to believe that it is wiser to trust the police with liberal powers than to hamper the investigation of crime by too many restrictions on the activities of its detectors.

Not the least valuable feature of the report is the finding of the Commission as to the effect on police and public of the enforcement of obsolete laws, or laws manifestly out of harmony with public opinion. They find that the enforcement of such laws exposes the police to temptations and reacts upon their morale and efficiency. Police corruption where it exists, is mainly associated with the enforcement of such laws. If we in New Zealand know of such laws we should do well to ponder the view of the Commission that: "In our view a grave responsibility rests on those who create criminal offences which are not precisely or clearly defined or in respect of which the requisite evidence to support a conviction cannot be obtained by straightforward and unequivocal methods. It is also unfortunate that by reason of defects in the law the police should be put in a position in which they must exercise a discretion as to whether the law is to be observed or not, or as to the degree of strictness to be observed in its enforcement. Any contempt for, or laxity in relation to, the law tends to spread, and the respect for and observance of the law is correspondingly weakened."

Court of Appeal.

Herdman, A.C.J.
MacGregor, J.
Ostler, J.

March 22; May 6, 1929.
Wellington.

JAMES v. MABIN.

Practice—Striking out Pleadings—Misrepresentation—Banker—Branch Manager—Alleged Misrepresentations and Advice by Manager of Bank as to Financial Position of Company Inducing Plaintiff to Sign Guarantees—Money Paid to Bank to Obtain Release from Liability Under Guarantee Claimed as Damages from Manager—Fraud and Negligent Advice Alternatively Alleged—Question of Law as to Whether Statement of Claim Disclosed any Cause of Action—Question Raised Before Statement of Defence Filed—Facts Necessary to Support Allegations in Pleadings Deemed Proved Unless Admission to Contrary—Claim Struck Out Only Where Obvious That No Reasonable Cause of Action—Not Struck Out Merely Because No Express Allegation that Representations Were in Writing—Quaere Whether all Representations Made Were as to Credit or Ability of Company with a View to Enabling Company to Obtain Credit—Possibility that Negligent Advice Might be Proved—Lord Tenterden's Act, 19 Geo. IV., c. 14, Sec. 6.

Appeal from the decision of Adams, J., reported 4 N.Z.L.J. 248, upon a question of law ordered to be argued before the trial of the action. The facts sufficiently appear in the report of the judgment. The question of law was whether the statement of claim disclosed any legal cause of action against the defendant company, and was answered by Adams, J., in the negative. The learned Judge decided that the case relied upon by appellant consisted of a series of representations or assurances which came within Section 6 of the Statute of Frauds—Lord Tenterden's Act—and that, as in his opinion those representations or assurances were made orally, no action based upon them could succeed.

Murdoch and Doogan, for appellant.

Myers, K.C., and W. F. Ward, for respondent.

HERDMAN, J., delivering the judgment of the Court, said that upon the argument before the Court of Appeal counsel for respondent did not seek to entrench himself behind that statute or, if he did do so, abstained from placing any serious dependence upon it. He preferred to submit that it was definitely established by the statement of claim as it stood, that when appellant launched his action he had no case in that the sum of £2,500 claimed for damages, being the amount paid by the appellant to the bank in December, 1927, to secure his release from liability under his guarantees, was paid with full knowledge of the alleged fraud of the respondent and that if the allegations in the statement of claim were proved at the trial they would show that appellant paid this money with full knowledge of the fact that the guarantees under which it was claimed had been obtained by fraud and that, therefore, the payment of £2,500 was no more than a gratuitous contribution to an institution which, assuming the allegations in the statement of claim to be true, was barred by fraud from recovering the money at law. In other words, he argued that if appellant suffered any loss he alone was responsible for it. As a specimen of legal draftsmanship the statement of claim was an embarrassing and confused production, but reading it through with great care their Honours had been unable to discover any admission that when the sum mentioned was paid over appellant was aware of respondent's fraud. For the purposes of the present appeal their Honours had to consider the case as if appellant were able to give complete proof of the facts necessary to support his claim including, in the absence of any admission to the contrary, the fact that he discovered, after he had parted with his money, that he had been defrauded. Their Honours could find nothing in the statement of claim which was the equivalent of an admission that he was aware of respondent's fraud when he paid the bank £2,500, nor could an inference that he possessed such knowledge be drawn from the allegations contained in the claim. It followed, therefore, that the point taken by counsel for respondent failed.

Their Honours then proceeded to consider the principles upon which a matter such as the present should be considered. No statement of defence had been filed. No point of law had, therefore, been raised by respondent, the defendant in the Court below, in his pleadings. If the action had been brought in England, respondent might have raised the point of law by his pleadings as provided by Rule 2 of Order XXV, or he might have applied to strike out the statement of claim under Rule 4 of Order XXV. In **Hubbuck and Sons v. Wilkinson, Heywood and Clark, Ltd.,** (1899) 1 Q.B. 86, 91, Lindley, M.R., referring to those two courses said "The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in rule 4, shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases." Their Honours referred also to the **Annual Practice,** 1929, p. 418. The power created by Rule 4 would only be exercised where the case was beyond doubt. The Court must be satisfied that there was no reasonable cause of action. In **Fraser v. Pape,** 91 L.T. 340, 341, where an application was made to strike out a statement of claim upon the ground that there was nothing in the claim or in the particulars to indicate the existance of any memorandum in writing to satisfy the requirements of Section 4 of the Statute of Frauds, Collins, M.R., refused to interfere and stop the action. In **Annual Practice,** 1929, p. 419, it was said that "where the statement of claim in its present form discloses no cause of action because some material averment had been omitted, the Court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend." As no defence had been filed and as, therefore, no point of law had been raised by any pleading, the question their Honours had to decide was whether it was plain and obvious that no cause of action had been disclosed? Their Honours referred to **Worthington and Co. Ltd. v. Belton,** 18 T.L.R. 438, where, upon an application to strike out a claim under Order XXV, Rule 4, the question for consideration was whether the statement of claim alleged a representation as to the credit, ability, trade or dealings of another person within Lord Tenterden's Act, the representation being alleged to have been made verbally, it was said that Lord Tenterden's Act was an answer to the action as the representations were alleged to have been made verbally. Romer, L.J., said that he had to ask whether Lord Tenterden's Act was obviously an answer to the statement of claim, and said that even on the strictest view, it was open to doubt whether Lord Tenterden's Act applied. Following the principles laid down by Chitty, J., in **Republic of Peru v. Peruvian Guano Co.,** 36 Ch. 489, 496, that under the rule the pleading would not be struck out unless it were demurrable and something worse than demurrable, he declined to strike out the statement of claim. Their Honours were unable to say that all the representations in the statement of claim which might come within Lord Tenterden's Act were not in writing. If any of the representations relied upon were in writing, no doubt the statement of claim should have said so, but their Honours knew of no authority which required them to strike out a statement of claim because, in a case within Lord Tenterden's Act, it was not specifically and expressly pleaded that the representation was in writing. In paragraph 7 of the statement of claim there was a statement that information was supplied to the appellant but as to whether or not the information was supplied in writing the paragraph was silent. In such circumstances their Honours did not think that they had any right to conclude that no writing existed. The same observation might be made about paragraph 11, which referred to a series of representations being made over a period of eleven months, and about paragraph 15. From the language used in those paragraphs their Honours could draw no certain inference that representations or assurances were not made in writing and they knew of no reason which obliged them to draw such an inference from the clause in its present form. Their Honours had to presume at that stage of the litigation, in the absence of any admission in the claim to the contrary, that appellant was armed with all the proof necessary and proper to support his allegations. If that proof were not forthcoming at the trial then the course followed in **Haslock v. Fergusson,** 7 A. and E., 86, could be taken. The Court might refuse to admit parol evidence and dismiss the action.

Their Honours were by no means sure that all the representations relied upon by appellant were within Lord Tenter-

den's Act. In paragraph 10, for instance, there was a representation about the solvency and financial position of certain timber merchants who were doing business with Rundle and Co. Incidentally, that might be a representation about the credit and ability of Rundle and Co., but it was also a representation about persons other than Rundle and Co. Their Honours doubted whether it was to be inferred with certainty from the language used in clause 10 that any representation or assurance was made with the intent that Rundle and Co. might obtain more money or extended credit or that they were made with the object of persuading appellant to continue to stand behind Rundle and Co. The clause showed that the financial position of the company was discussed and that, in the course of an interview, an optimistic account was given by respondent of Rundle's financial position. He might have intended to bolster up the company's financial position so that it could get more credit, or that might not have been his intention at the time. Such a question a jury would have to decide on proof of all relevant facts. Then again, the appellant rested his action upon two grounds. Not only did he allege fraud, but he also based a claim upon negligent advice. It was possible to extract from the confused provisions of the statement of claim an intention to rely upon two causes of action so, if one failed, and an intelligible cause of action remained, the appellant might rely upon the one that survived. It was true that to succeed upon the ground of negligent advice appellant must prove that certain relations and circumstances existed which imposed upon respondent a special duty to take care when tendering advice. Between the two the relation of banker and customer did not subsist. Appellant was a surety. The statement of claim stated that he assumed that role upon the advice and at the request of respondent, and for accepting that responsibility he was to be remunerated. But, as it was put in **Royal Bank of Scotland v. Greenshields,** (1914) S.C. 259, 266, 267, "a bank-agent is entitled to assume that an intending guarantor has made himself fully acquainted with the financial position of the customer whose debt he is about to guarantee. And the bank-agent is not bound to make any disclosure whatever regarding the customer's indebtedness to the bank. But if he does, either voluntarily or in answer to a question put, make any representation which turns out to be erroneous or untrue, then the guarantor who has relied upon that statement is entitled to liberation from his obligation." In the present case appellant was not claiming to evade his responsibilities as a surety but asked for damages. It was alleged that respondent knowing all the circumstances negligently allowed appellant to assume substantial liabilities. Not only that, but he was charged with negligently tendering advice and giving reckless answers to inquiries made of him. Their Honours wished it to be clearly understood that they refrained from deciding, in the present proceeding, that the statement of claim contained enough material to constitute a claim based upon an allegation that respondent in breach of duty tendered negligent advice. **Banbury v. Bank of Montreal,** (1918), A.C. 626, was an authority for the proposition that if a banker specially took it upon himself to advise a customer as to investments, although gratuitously, he would be liable in damages if he acted negligently. But, as already mentioned, in the present case appellant was not a customer of the bank. It would seem that no special relation between himself and respondent which imposed a duty to exercise care existed and, as their Honours understood the authorities, they went no further than to declare that if questions were asked of him by the guarantor, respondent was bound to tell the truth and that if, in such circumstances, he did not tell the truth the surety, upon discovering the duplicity, was free to repudiate the obligation created by his guarantees. However, appellant might be able to submit evidence and contend at the trial that facts had been proved which showed that respondent committed some breach of duty which entitled him to relief. Without expressing any opinion one way or another on the claim for relief on that ground, their Honours stated in conclusion that an examination of the statement of claim had failed to satisfy them that any plain, obvious reason existed for interfering with the litigation between the parties at that stage.

Appeal allowed.

Solicitor for appellant: **Hannan and Seddon,** Greymouth.

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

Supreme Court.

Blair, J. *April 22, 23, 1929.*
Auckland.

AH DONG v. SKINNER.
MOI YOU FONG v. ARTHUR SKINNER.

Summary Conviction—Appeal—Appeal from Conviction by Magistrate after Pleading Guilty—Quaere Whether any Appeal Lies from Plea of Guilty—Counsel Entitled to Plead Guilty on Behalf of Accused Person Charged with Offence which may be Tried Summarily—Appeal Dismissed.

Appeal by two Chinese, Ah Dong and Moi You Fong, both of whom pleaded guilty in the Magistrates' Court at Tauranga, one to being in possession of prepared opium, and the other to smoking opium.

Schramm for appellants.
Meredith for respondent.

BLAIR, J., in an oral judgment, said that the case was unusual in that it was an appeal from a plea of guilty. By reason of the attitude taken by the Crown Solicitor, the question did not arise, but His Honour very much doubted whether there was any right of appeal when the parties had pleaded guilty. *In* **R. v. Worth,** 1 N.Z.L.R.S.C. 399, a judgment of *Richmond, J.*, an appeal was permitted after a plea of guilty, but the case had peculiar features in it, and the judgment was based on the fact that the plea of guilty was really not a plea of guilty at all. If that fact could in the present case be established, a general appeal might lie. If it were established that no plea were entered, or that there was mistake, then the appeal would lie, because it would really be an appeal from a plea of not guilty. But His Honour was quite certain that the Chinamen knew what they were doing, and for their own particular reasons desired that a plea of guilty be entered. That being the case His Honour did not think that the Court could treat the plea as virtually one of not guilty.

There remained the question whether it was essential that a plea in a Court of summary jurisdiction must be given by the accused himself. It was contended that it was not open to the Court to accept a plea from counsel representing a person charged with an offence triable summarily. It was a very common practice in Summary Courts and there was to His Honour's mind no doubt that a plea could be validly given by counsel on behalf of an accused person charged with an offence triable summarily. There was authority for that proposition. See **Ex parte Long,** 74 J.P. 40, and **R. v. Thompson,** (1909) 2 K.B. 614. In the present case it appeared that counsel was undoubtedly authorised to plead on behalf of the appellants. Moreover on the facts Ah Dong was clearly guilty, and although the case against the other accused, without his admission of guilt, was not a strong one, there was evidence on which he could have been convicted, even if he had not pleaded guilty.

Appeal dismissed.

Solicitor for appellants: **F. C. Schramm,** Auckland.
Solicitors for respondent: **Meredith, Hubble and Ward,** Auckland.

Smith, J. *October 17, 1928; March 12, 1929.*
Auckland.

IN RE McMILLIN.

Will—Construction—Forfeiture—Bequest of Residue Upon Trust for Son and Daughter Equally—Son's Share to be Held Upon Trust to Pay Income to Son for Life or Until He Attempts to Deprive Himself or is Deprived by Bankruptcy from Personally Receiving or Being Entitled to Receive Same, and Then In Trust for the Children of Such Son—Provision that if Son Deprived of Income from any Cause Whatever, or on Death of such Son, Wife Entitled to Receive Such Income Provided She Maintains Educates and Brings Up Children—Share of Child of Son Being Male to Vest on Attaining Twenty-one or Being Female Attaining Such Age or Marrying with the

Consent of Her Parent or Guardian—Provision that Decision of Trustee as to Whether Son Deprived of Personal Benefits to be Final—Authority Given by Son Authorising Solicitor to Pay Income to Wife—Notice of Wife's Authority to Receive Income Subsequently Given to Trustees—Authorities to Wife to Receive Income Not Assignments and therefore Not Sufficient to Cause Forfeiture of Son's Interest—Son Subsequently Adjudicated Bankrupt—Interest of Son Held Forfeited Upon Bankruptcy—Class of Children Entitled to Take Fixed at *Date of Forfeiture and Not Postponed Until Death of Son*—Children Born After Forfeiture Not Entitled to Share in Capital or Income—No Provision in Will Extending Class—Rule of Convenience that Class Not Capable of Increase Once Any Child of Such Class Entitled to Payment Applied—Upon Forfeiture Son's Wife Entitled to Income of Shares of Children Subject to Maintenance and Education of Children Until Vesting of Share of Each Child.

Originating Summons to determine certain questions arising out of the will of Noble McMillin, deceased, who died on 26th March, 1917. After making a bequest of his personal effects to his son, R. N. McMillin, the testator by his will gave the remainder of his real and personal estate upon trust after conversion for division equally between his son, R. N. McMillin, and his daughter, R. E. Grayson. The testator declared, however, that the trustee under the will should hold the share and interest of his son, R. N. McMillin, "upon trust to invest the same and to pay the income resulting therefrom to my said son during his life or for such period as he shall not attempt to deprive himself or as he shall not be deprived by bankruptcy or otherwise from personally receiving or being personally entitled to receive the same for his own absolute use and benefit and so also that he shall not have any right or power to anticipate same and from and after the death of my said son or his being deprived of the actual personal benefit of the said income (whichever event shall first happen) then upon trust for the child or children of my said son and if more than one in equal shares absolutely declaring, however, that should my said son be deprived from any cause whatever of the said income then that his wife shall be entitled to receive same provided she shall maintain, educate and bring up my son's children to the satisfaction of my trustee and declaring further that on the death of my said son the said income shall be paid to his widow subject to the aforesaid conditions as to the upbringing of my said son's children and declaring further the receipt of my said son or of my said son's wife or widow shall be an absolute discharge to my said trustee for any moneys thereby purported to have been paid and received and declaring further that the share or shares to which any minor shall be entitled shall vest and become payable on such minor (being male) attaining the age of twenty-one years or (being female) attaining that age or marrying with the consent of her parent or guardian and declaring further that the provisions of the will in favour of my said son are made in his own interests and that if he shall do or permit anything whereby he may be or become deprived of the actual personal enjoyment of the benefits I desire to confer upon him then that the trusts resulting shall immediately become operative and take effect and that the decision of my trustee as to whether my said son has been deprived of the actual personal benefits of the trusts in his favour herein contained shall be absolutely final and conclusive and declaring lastly that nothing herein contained shall deprive any child of my said son from becoming beneficially entitled to his or her share under this my will beyond the death of my said son or such child attaining the age of twenty-one years subsequent thereto." Probate was granted to the executor named in the will on 17th April, 1917, and he continued in office until 25th February, 1927, since which date the Public Trustee had administered the estate. The testator left him surviving his son, R. N. McMillin, his son's wife, E. M. McMillin, and their four infant children. A fifth child was born to the son and his wife on 26th May, 1917. These were all defendants. The son's eldest child, Mabel, attained her majority on 10th February, 1918, and his second child, Robert, reached 21 on 5th January, 1927. The remaining children were minors. The share of income to which R. N. McMillin was entitled under the will was at first paid to him. On 29th June, 1921, however, the son gave an authority to Mr. T. B. Crump, a solicitor, to pay to E. M. McMillin, his wife, the nett balances of revenue received or to be from time to time received from the trustee under his father's will. The authority was stated to be the irrevocable, the intention being "that my wife shall hereafter draw the above revenue subject to any proper charges thereon or deductions therefrom in the interests of herself, myself, and our children." That authority was not notified to the executor of the will until June, 1922, when the son signed a second letter to the trustee, Quin, authorising such trustee to pay all income to his wife for the future as he recognised that this course was in the interests of the family. This document was sent to the trustee, Quin, who thereafter, during his trusteeship, paid over the son's share of the income to Mr. Crump, on behalf of E. M. McMillin. On 21st July, 1922, the defendant M. M. E. Cleaver (then McMillin), being over 21 years of age, assigned to her mother E. M. McMillin, all her share and interest in the residuary estate under the will, to secure payment of the sum of £200, further advances and interest, subject to a prior charge of £200 to the trustee, Quin. The testator's son R. N. McMillin was adjudicated bankrupt on 9th January, 1923, and was still an undischarged bankrupt at the date of these proceedings. By submortgage dated 22nd December, 1923, E. M. McMillin assigned to Mr. Crump her estate and interest under the mortgage of 21st July, 1922, from her daughter to herself, to secure payment on demand of the principal sum, further advances and interest. On 29th July, 1927, following the appointment of the Public Trustee as administrator, Mr. Crump called up the moneys owing under the securities and later requested the Public Trustee to pay to him the principal of the share or interest of the daughter M. M. E. Cleaver in the estate, and all income payable in respect thereof. The Public Trustee took out an originating summons; the questions raised in the summons appear sufficiently in the report of the judgment

Northcroft for Public Trustee and unborn children of R. N. McMillin and his wife.

Leary for R. N. McMillin.

Burt for E. M. McMillin.

Richmond for T. B. Crump, M. M. E. Cleaver, and R. N. McMillin, Junior.

SMITH, J., said that the trustee had submitted the question to the Court as to whether deprivation had taken effect upon bankruptcy, but the will gave the trustee power to make a final decision. His Honour proposed to indicate only the time at which he thought the trustee should decide when the deprivation of the son's interest took place. The words "attempt to deprive" related only to the income of the son's share and not to the gift over of the corpus, but even so, they involved an intention "to deprive." In His Honour's opinion, the testator intended that the gift over of the corpus might take place either by reason of an act of the son or of an act *in invitum* of the son. The essential event was to be the doing or permitting of some act by which the son was deprived, or by which he might, at the will of another, be or become deprived of the actual personal enjoyment of the income. The words "may be or become deprived" were intended to add something to what had gone before: compare **In re Loftus-Otway, Otway v. Otway,** (1895) 2 Ch. 235. There were three events which might be alleged as constituting a forfeiture. The first letter of 29th June, 1922, was expressed to be irrevocable. If it were an assignment, its mere non-communication to the trustee until June, 1922, would not prevent it from being an assignment under which the title of the assignee was complete against the assignor: **Gorringe v. Irwell India Rubber Works,** 34 Ch. D. 128. Mr. Crump's affidavit showed, however, that the first letter was not intended to be a final deprivation of the son's control of the income. His Honour held that it did not operate as such. Mr. Richmond relied mainly on the second letter of 13th June, 1922, as constituting an assignment sufficient to work a forfeiture of the son's interest at that date. The burden of proof lay on those who asserted that a forfeiture had taken place: **Cox v. Rockett,** 35 Beav. 48. An authority to receive income which was given *bona fide* was not of itself sufficient to cause a forfeiture dependent on an act of alienation: **Avison v. Holmes,** 1 J. & H. 530. On the other hand, the effective assignment of the right to the income would involve loss of the personal benefit of the income. The question in every case was one of intention: **Smith v. Perpetual Trustee Co. Ltd.,** 11 C.L.R. 148. His Honour adopted the view expressed by Higgins, J., in that case at p. 167, and said that he did not think that the letters of authority from the son to his wife were intended by him to do more than appoint her his agent to receive the income and disburse it, on his behalf, for the benefit of his family, including both himself and his wife. The authority commenced with the words, "recognising that it is in the interests of my family." The alleged assignment did not purport to transfer all the son's right, title and interest in the fund and in the income arising therefrom; and in His Honour's opinion the absolute control of the income referred to did not amount to such. An irrevocable request and authority to pay was unnecessary if the document operated as an assignment, for by such a contract the property would have vested in the wife. In His Honour's opinion the document did not oper-

ate as an assignment. Nor was it to be regarded as an irrevocable power of attorney, for the authority was not supported by consideration nor made by deed. His Honour thought, therefore, that it was not shown that the authority to the wife operated or was capable of operating at the will of another as a forfeiture of the son's interest under the will.

There was no doubt, however, that the bankruptcy would so operate, as it was a specified event. Moreover, His Honour thought that an act of bankruptcy by reason of which the son might become deprived of the benefit conferred upon him might be capable of working a forfeiture : **In re Loftus-Otway, Otway v. Otway** (*cit. sup.*). The papers filed did not show whether the son was adjudicated upon his own petition, or upon a creditor's petition. The next question was whether the bankruptcy or act of bankruptcy did operate as a forfeiture. Where income was payable to a bankrupt at the time of the bankruptcy or act of bankruptcy, the forfeiture clause would take effect : **In re Forder,** (1927) 2 Ch. 291. As that was the position in the present case His Honour expressed the opinion that the forfeiture clause took effect upon the occasion of the act of bankruptcy or of the date of adjudication itself as the case might be.

His Honour was of opinion that upon the occurrence of the forfeiture, the corpus of the son's share was to be held upon trust for his child or children, and if more than one in equal shares. That was admitted by counsel for the respective parties. The next matter was as to the class of children entitled to take. The gift over of the corpus was expressed by the testator to take effect either (a) upon the son's death, or (b) upon his deprivation, whichever should first happen. The will contained the following declarations as to the destination of the income after the gift over had taken effect : (1) " Declaring however that should my said son be deprived from any cause whatever of the said income then that his wife shall be entitled to receive same provided she shall maintain educate and bring up my son's children to the satisfaction of my trustee." (2) " Declaring further that on the death of my said son the said income shall be paid to his widow subject to the aforesaid conditions as to the upbringing of my said son's children." There followed the third declaration as to the receipt of the income. (3) " Declaring further that the receipt of my said son or of my said son's wife or widow shall be an absolute discharge to my said trustee for any moneys thereby purported to have been paid and received."

Viewing the will as a whole, His Honour was of opinion that the proper construction of the first two declarations was that each applied only upon the occurrence of the event to which it referred. The first applied only upon the gift over taking effect upon the deprivation of the son ; the second only if it took effect upon the death of the son. The third declaration as to receipts applied respectively to the son, during his enjoyment of the income ; to the wife, if she received income for the maintenance, education and up-bringing of the children upon the occurrence of a gift over caused by a forfeiture during the life of the son ; and to the widow if she received income for the purposes stated upon a gift over occurring by reason of the son's death. It followed, His Honour thought, from that construction of the declarations that the use of the word " widow " in the second declaration could not be called in aid to determine whether children, e.g., of a second wife, were to be included in the class taking upon a gift over occurring by reason of a forfeiture during the life of the son. The gift over was not in the usual form. Frequently the trust was to pay the income to the son during his life and to direct protection of the share of the son in the event of his bankruptcy or insolvency, and to direct that the corpus of the son's share should be held in trust for all of his children living at his death. In **Jarman on Wills,** 6th Edn., 1678, it was said that the usual way is to give a determinable life interest to A with a gift to the children on his death and a declaration that in the event of his life interest being determined during his life the income shall be applied in the same manner as if he were dead. A clause in that form was construed in **In re Bedson's Trusts,** 28 Ch. D. 523, where it was held by the Court of Appeal that the period of distribution was not the bankruptcy but the death of the son, although in arriving at that result the Court was obliged to pass by the testator's express declaration that on the bankruptcy of the son the capital fund was to go as if he were dead. Where the will provided that income was to be paid to the son until he should become bankrupt and then effected a gift over to children who attained 21 years of age, the rule of construction appeared to be laid down in **In re Smith,** 2 J. & H. 594. The rule was that if the deprivation of the life interest occurred on bankruptcy and there was no extension of the class of children let in, the class was fixed at the time of the bankruptcy if there was then in existence a child who had attained 21 ; if, however, the first child to attain 21 did so after the forfeiture, children born in the meantime were included, subject to their attaining 21. See also **Re Aylwin's Trusts,** L.R. 16 Eq. 585, but the gift over there was to children without restriction as to age, **28 Halsbury's Laws of England,** Par. 1340. The question as to whether the class had been extended depended upon the true construction of the will. His Honour had indicated that the word " widow " in the second declaration set out above was not of assistance in this matter. The testator had declared, however, " that the share or shares which any minor shall be entitled to shall vest and become payable on such minor (being male) attaining the age of twenty-one years or (being female) attaining that age or marrying with the consent of her parent or guardian." That clause meant on the face of it that any minor who attained 21 should be entitled to payment of his or her share. It was, therefore, entirely consistent with the closing of the class in accordance with the rule established by **In re Smith** (*cit. sup.*). The only indication to the contrary was the last declaration, namely, " and declaring lastly that nothing herein contained shall deprive any child of my said son from becoming beneficially entitled to his or her share under this my will beyond the death of my said son or such child attaining the age of twenty-one years subsequent thereto." In His Honour's opinion, that last declaration applied only to the case of the gift over taking effect upon the death of the son. It was a cautionary clause directed against a perpetuity. It did not apply to the case which had occurred. In His Honour's opinion, therefore, the will did not extend the class to take on bankruptcy, but confirmed the view that the class was fixed at the time of the bankruptcy. Dealing with the matter from the point of view of authority, His Honour thought that the case of **Public Trustee v. Gibson,** 32 N.Z.L.R. 777, did not apply to the wording of the present will. Furthermore if the direction as to the vesting and payment of the child's share at 21 were inconsistent with the last declaration of the will, His Honour thought that the rule of convenience explained by Jessel, M.R., in **In re Emmett's Estate,** 13 Ch. D. 484, 490, should be applied, namely that " so soon as any child would if the class were not susceptible of increase be entitled to call for payment, the class shall be incapable of being increased." See also **In re Knapp's Settlement,** (1895) 1 Ch. 91. The case of **Blackman v. Fysh,**(1892) 3 Ch. 209 is to be limited to the particular facts of that case ; see Eve, J.'s criticism in **In re Canney's Trusts,** 101 L.T. 905, 907. In the present case the eldest daughter M. M. E. Cleaver was clearly over 21 at the time of the forfeiture. It followed that the class was then closed. All of the son's children were then born and were included, but no child or children thereafter born to the testator's son were entitled to be admitted to the class.

The next question related to the destination of the income after the forfeiture. On the one hand the wife was entitled to receive the income provided she maintained educated and brought up the children of the testator's son to the satisfaction of the trustee. On the other hand, each minor was entitled to payment of his or her share on attaining 21 years, if male, or on attaining that age or marrying, if female. It was clear that a child's right to maintenance did not cease *ipso facto* upon attaining 21, but in every case the question must be resolved upon the construction of the particular document conferring the right to maintenance. If the construction which His Honour had adopted was correct, it was clear that the wife, while she maintained, educated and brought-up the children to the satisfaction of the trustee, was entitled to the income of the shares of the children, until being male they attained 21 or being female they attained that age or married with the consent of the parent or guardian under that age. When the children were entitled to the payment of their own shares the wife's right to receive the income of their share for the purposes of their maintenance, education and upbringing ceased.

His Honour therefore answered the questions as follows : (1) The trustee should decide that the interest of the defendant R. N. McMillin absolutely ceased and determined as from the date of his adjudication, or from an act of bankruptcy as the case might be. (2) Upon the occurrence of the forfeiture, the defendant E. M. McMillin became entitled to receive the income of the shares of all the children, other than that of M. M. E. Cleaver, subject to the obligations imposed upon her. Thereafter she continued entitled to the income of the share of each child subject to the same conditions, until that child if male attained 21, or if female attained that age or married with the consent of her parent or guardian. (3) The defendant M. M. E. Cleaver was entitled to payment of the corpus of her share of the estate upon the occurrence of the forfeiture. (4) The defendant R. N. McMillin, Junior, became entitled on 5th January, 1927, when he attained 21, to payment of the corpus of his share of the estate of the deceased. (5) The children of the defendant R. N. McMillin who might be born after the forfeiture were not

entitled to participate in the income or capital of the estate of the deceased, by reason of the forfeiture of their father's life interest.

Solicitor for plaintiff: **Solicitor to the Public Trust Office,** Wellington.

Solicitors for R. N. McMillin: **Bamford, Brown and Leary,** Auckland.

Solicitor for E. W. McMillin, **A. Hanna,** Auckland.

Solicitors for T. B. Crump, as assignee of M. M. E. Cleaver, for M. M. E. Cleaver, and R. N. McMillin, Junior: **Buddle, Richmond and Buddle,** Auckland.

Kennedy, J. February 21; March 27, 1929. Auckland.

SHEPHERD v. SUNDERLAND.

Vendor and Purchaser—Specific Performance—Whether Time of Essence of Contract—Agreement by Vendors to Sell Land to Purchaser—Provision that Possession to be Taken by Purchaser on Certain Date—Balance of Purchase Moneys to be Paid on Date Fixed for Completion—Express Provision that Time for Performance of Covenants by Purchaser of Essence of Contract—Agreement by Vendors to Purchase Land from Purchaser also Providing for Payment of Balance of Purchase Moneys on Day Fixed for Completion and that Vacant Possession be Given on that Date—Transaction an Exchange—Failure of Vendors to Give Possession on Date Fixed Although Purchaser Ready to Complete and to Give Title to Property in Exchange—Time for Taking Possession Expressly Made of Essence of Contract—Implication That Time for Giving Possession also of Essence of Contract—Provision that Interest to be Paid on Purchase Money Not Paid on Date Fixed for Completion Not Sufficient to Negative Express Provision that Time for Completion of Essence of Contract—Provision Conferring Additional Remedies on Vendors if Default Made by Purchaser for Fourteen Days in Payment of Instalments or Interest or in Observance of Covenants Held Not to Restrict Rights of Purchaser or to Give Vendors Time for Performance of Covenants.

Action claiming specific performance of two agreements for sale and purchase. Under one agreement, dated 10th March, 1928, and signed by both parties, the defendants agreed to sell and the plaintiff to purchase a property for convenience referred to as the "Huapai property." The purchase price was £931 5s. 6d. The plaintiff was to pay a deposit of £10, to take over an existing first mortgage to the State Advances Superintendent, and a second mortgage, and to pay the balance in cash on the date fixed for completion of the contract. The agreement provided that, if from any cause whatever (save the default of the vendors) the purchase should not be completed by the 19th March, 1928, the purchaser should pay to the vendors interest at seven per cent. on the remainder of the purchase money from that period until completion of the purchase. This stipulation was expressed to be *without prejudice to any* of the vendors' rights under this agreement. Possession was to be given and taken on 19th March, 1928. Clause (6) provided: "If the purchaser shall make default in payment of any instalment of the purchase moneys hereby agreed to be paid or of interest thereon or in the performance or observance of any other stipulation or agreement on the part of the purchaser herein contained (the times for such payment or performance fixed by these presents being both at law and in equity strictly of the essence of the contract) and such default shall be continued for the space of fourteen days," then the vendors might without prejudice to their other remedies at their option either rescind the contract of sale and forfeit all moneys paid to the purchaser, or without demand re-enter and take possession of the property or re-sell the said property. Under the other agreement, also dated 10th March, 1928, which was signed by the plaintiff only, the plaintiff agreed to sell and the defendants to purchase a house property, for convenience referred to as the "Edendale property." The purchase price, the sum of £1,000, was to be paid as follows: £10 by way of deposit, £700, by the purchasers taking over a first mortgage of £700, and the balance in cash on the day fixed for completion. The agreement contained a printed clause to the effect that the property was bought and sold subject to existing tenancies (if any); while at the end of the agreement there was added the clause: "The vendor agrees to give vacant possession of the property mentioned in the schedule hereto on the date fixed for completion."

It was admitted by the parties that the two agreements for sale and purchase were in substance a transaction by way of exchange. The defendants owned and occupied the Huapai property, while a tenant occupied the Edendale property. The defendants intended to take possession of the Edendale property on 19th March, 1928. Their solicitors had tendered a transfer of the Edendale property and on 19th March, 1928, the defendants had done all that they were bound to do to require possession and completion. No money was then tendered by the defendants to the plaintiff, but this was not necessary as a balance in cash was payable on the exchange by the plaintiff to the defendants. The defendants, on 19th March, 1928, packed up their personal belongings at Huapai and were ready to give possession of that property to the plaintiff and were ready to take and required vacant possession of the Edendale property. The plaintiff did not give, and was not in a position to give vacant possession until 22nd March, 1928. The defendants, therefore, declined further to be bound by the contract and the plaintiff brought the present action.

Coates for plaintiff.

Adams for defendants.

KENNEDY, J., after stating that the defence that there was no sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds had been abandoned, said that there remained the substantial defence that, on 19th March, 1928, the plaintiff failed to give vacant possession of the Edendale property although the defendants were ready and willing to complete. The question arose whether the plaintiff had failed to perform any part of the contract at the time or times specified and, if so, whether those times were of the essence of the contract. If they were, then the plaintiff, failing to perform his part of the contract at the time specified, would not be able to enforce specific performance. The intention to make time of the essence of the contract, as to any one or more of its terms, might be expressly stated in the contract or it might be implied either from the nature of the contract itself or from the surrounding circumstances. Where the parties had stipulated that time should be of the essence of the contract as regards one or more of its terms, the Court would treat such stipulation as valid and binding: **Steedman v. Drinkle,** (1916) A.C. 275, 279. Under both agreements the time fixed for the performance of the stipulations of the agreements on the part of the purchaser were expressly stated to be, both at law and in equity, strictly of the essence of the contract. Under the first agreement it was of the essence of the contract that the purchasers, i.e., the defendants, should take possession of the Edendale property on 19th March, 1928; and under the second agreement it was of the essence of the contract that the purchaser, i.e., the plaintiff, should take possession of the Huapai property on the same day. These two agreements were not independent agreements by way of sale, but were agreements by way of exchange. If then it was of the essence of the contract that the defendants should take possession of the Edendale property on 19th March, 1928, His Honour thought it must follow that it was of the essence of the contract that the plaintiff should himself give possession of that property on that date; and likewise if it was of the essence of the contract that the plaintiff should take possession of the Huapai property on 19th March, 1928, it must follow that it was of the essence of the contract that the defendants should on that date give possession of that property. The general rule was that where one party had made stipulations in his favour of the essence of the contract, the Court would *prima facie* hold time to be essential in respect of all other stipulations which were against him: **Seaton v. Mapp,** 2 Coll. 556, 564. It had, however, been submitted in answer that provision was made for the purchasers paying interest in the event of the purchase not being completed by 19th March, 1928, and that stipulation showed that the time for completion was not of the essence of the contract, and **Webb v. Hughes,** L.R. 10, Eq. 281, was quoted in support. All that case decided, however, was that the express terms of the contract, namely the provision as to payment of interest in the event of the completion being delayed, excluded the implication otherwise arising from the surrounding circumstances. In the agreement under consideration, however, there was an express provision that the time fixed for the performance or observance of any stipulation on the part of the purchaser was to be strictly of the essence of the contract. The provision for payment of interest in the event of the purchase not being completed on the due date was, no doubt, intended for the adjustment of the rights of the parties under the agreement when it was actually completed, but it would not operate to negative an express stipulation of the agreement making time of the essence.

It was further argued that clause 6 of the second agreement gave the plaintiff (the vendor of the Edendale property) a period

of 14 days after 19th March, 1928, in which to give vacant possession. Both agreements were for the most part silent as to the purchaser's rights in the event of failure of the vendor to perform his obligations and the purchaser's rights must, in that event, be left to be determined by the general law. Clause 6 purported to confer upon the vendor, when the purchaser was in default for 14 days, certain rights which were evidently regarded by the draftsman as additional to his rights under the general law, for the rights were conferred "without prejudice to his other rights." At most clause 6 provided that the special remedies, given by that clause to the vendor, did not arise until 14 days after default. That clause enlarged a vendor's remedies where default had been made by a purchaser. It did not purport to restrict a purchaser's rights where default has been made by a vendor. A vendor in default could not claim that clause 6 gave him a further 14 days' grace beyond the time stipulated for the performance of his acts.

It was clear that the defendants endeavoured to take possession of the Edendale property on the 19th March, 1928, and, at the same time, to give the plaintiff possession of the Haupai property. The plaintiff and his solicitors from 10th March, 1928, had the fullest information that the defendants required possession and completion on 19th March, 1928. The plaintiff had not, on 19th March, 1928, over the Edendale property the £700 mortgage stipulated for in the agreement, and had not tendered to the defendants any transfer of the Huapai property nor the money required on his part to make equality of exchange. The plaintiff was not ready to complete on the date for completion. His Honour concluded that the plaintiff on 19th March, 1928, had failed to perform those obligations which lay on him and in respect of which time was of the essence while, on the contrary, the defendants were ready and willing on the date fixed for completion to perform their part and required the plaintiff to perform his part. The defendants were therefore discharged. His Honour said that the evidence did not establish any waiver by the defendants of the objection. No doubt the plaintiff anticipated having vacant possession on 22nd March, 1928, but the evidence did not establish that the defendants definitely agreed to extend the time to that date.

Judgment for defendant.

Solicitors for plaintiffs: **Hanna and Tole,** Auckland.

Solicitors for defendants: **Addison and Adams,** Auckland.

Kennedy, J. February 25; April 22, 1929. Auckland.

IN RE SINGER.

Barrister and Solicitor—Costs—Taxation—Fee Charged for Services as Barrister by Barrister and Solicitor not Acting as Solicitor in Particular Transaction not Taxable—Law Practitioners Act, 1908, Sections 26, 28, 29, 30.

Summons taken out by one Martin for an order referring to the Registrar for taxation a bill of costs rendered by Mr. R. A. Singer, a barrister and solicitor. Martin had appeared in the Police Court at Auckland to answer a criminal charge, and was remanded to appear later. Mr. Singer was then engaged by Martin to defend him, and appeared in the Police Court when Martin was further remanded and later at the preliminary hearing, at the conclusion of which Martin was committed to the Supreme Court for trial. Mr. Singer said that he had reason to believe that fees due by Martin to other solicitors for work done in previous litigation had not been paid and named his fee at three hundred guineas, and insisted upon two-thirds of the fee being paid before he acted on Martin's behalf. £200 was paid by Martin, but immediately prior to the trial in the Supreme Court, Martin notified Mr. Singer that he had decided to employ other counsel and required his bill. Eventually Mr. Singer, who denied Martin's right to a solicitor's bill of costs, supplied a note of his fee, in which Martin was debited with £315, being "my counsel's fee as arranged herein," and credit was allowed for £200 paid.

Stanton in support of summons.

McVeagh to show cause.

KENNEDY, J., said that it had been submitted on behalf of Mr. Singer that the fee paid or payable by Martin was not taxable by the Registrar under the provisions of the Law Practitioners Act, 1908. His Honour was of opinion that that objection was sound. The fee charged was not for services to be rendered by Mr. Singer as solicitor, though it was true that a solicitor might appear as an advocate in the Police Court, but rather for services to be rendered by "counsel" which must, in the circumstances of the present case, have meant services by Mr. Singer as barrister and not as a solicitor. The fee was named as "counsel's fee" and the difference between counsel's fee and ordinary solicitor's charges was explained to Martin when the fee was named. The question accordingly arose whether the fee charged by a barrister, who was not also acting as solicitor for the client, for his services as barrister, might be referred to the Registrar for taxation under the Law Practitioners Act, 1908. In New Zealand the same person frequently practised both as a barrister and as a solicitor. There was in New Zealand only one class of barrister, namely one holding the rank of King's Counsel, to whom the patent had been granted since 12th October, 1915, who, if enrolled as a solicitor, might not take out his practising certificate as a solicitor under Section 45 of the Law Practitioners Act, 1908, and practise as a solicitor. Barristers of the Court in New Zealand had all the powers, privileges, duties and responsibilities that barristers had in England: Law Practitioners Act, 1908, Section 11. In England there was no rule of law, but only one in etiquette, that a barrister should be instructed by a solicitor: **Bennett v. Hale,** 15 Q.B. 171. His Honour thought, therefore, that there was nothing to prevent Mr. Singer, although both a barrister and solicitor, agreeing with Martin, in a matter which fell within the scope of work of a barrister as such, to act in that matter as barrister, and to render or agree to render service as a barrister as distinct from service as a solicitor. He might act as counsel, although he was at no time solicitor for Martin, the person employing him.

The Law Practitioners Act, 1908, did not in terms make provision for the taxation of the fees of a barrister, but rather for the taxation of the fees or charges of a solicitor. Section 28 provided that no solicitor should commence or maintain any action for the recovery of any fees, charges, or disbursements for any business done by him until the expiration of one month after the delivery of the signed bill. Section 29 provided for a reference of the bill of costs to taxation upon the application, within such month, of the party chargeable by the bill whether the business contained in such bill, or any part thereof, had been transacted in any Court or not. Section 30 provided for a reference after one month or, under special circumstances, more than twelve months, after the delivery of the bill. The fees and charges so taxable were the fees and charges of a solicitor acting as such. The "business" referred to in Section 28 must, to use the language of Lord Langdale, in **Allen v. Aldridge,** 5 Beav. 401, be "business in which the solicitor was employed because he was a solicitor, or in which he would not be employed if he had not been a solicitor." The Act did not provide machinery for the taxation of the fees and charges payable to a solicitor for services rendered not as solicitor but in some other capacity. Thus in England it had been held that the statutes relating to the remuneration of solicitors did not apply to a solicitor employed as clerk to a local authority at a fixed salary—**Bush v. Martin,** 2 H. & C. 311; nor to a solicitor acting as scrivener in procuring a loan on commission—**Gradwell v. Aitchison,** 10 T.L.R. 20; while in New Zealand it had been held that the provisions as to taxation of a solicitor's bill of costs, did not apply to a procuration fee charged by a solicitor for procuring a loan: **In re Browning,** 5 N.Z.L.R. 485, and **In re Bennett and Jacobsen,** (1924) G.L.R. 44, for such a charge was not the professional charge of a solicitor, but rather a charge for services rendered as a commission agent, or money broker. Neither in His Honour's opinion was service rendered by a barrister as such, although that service were rendered by a person who happened to be also a solicitor, service which could be said to be rendered by a solicitor as such when in fact the relationship of solicitor and client had never existed. It was also not without significance that the provisions appearing in Sections 26 to 39 of the Law Practitioners Act, 1908, were copied from provisions of the English Acts relating to the remuneration of solicitors. It was not easy to see how a registrar, unless he fixed the same fee for a counsel of the greatest eminence and of the greatest skill as for the most junior and inexperienced counsel, could tax the fees actually charged by particular barristers for their services as such, although it was easy to see that a registrar might without difficulty fix an amount which, having regard to the complexity of the work and its importance, it was reasonable to pay in fees to counsel. His Honour did not apprehend that the door was opened by this decision, as suggested by counsel for the applicant, to evasion by solicitors of the provisions of Section 26 of the Law Practitioners Act, 1908. That section operated for the relief of solicitors rather than for the benefit of their clients, and the Court would look as well to the substance as to the form of a transaction.

Summons dismissed.

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

Solicitors for Mr. R. A. Singer: **Russell, McVeagh, Bagnall, and Macky,** Auckland.

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

(Concluded from page 121)

PRACTICE (Continued)

5. Service.

For mode of service upon persons who are not made parties but who are entitled to apply under the Act, see *Higgins v. Public Trustee* (supra); *Lean v. Tipping* (supra).

6. Representation.

Where the executor is a disinterested party he is not invariably represented at the hearing: see *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.; *E. v. E.*, 34 N.Z. L.R. 785 C.A. He usually appears, however, and submits to the order of the Court: *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Re McCarthy*, (1919) N.Z.L.R. 807. He may also submit argument or make suggestions. See *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Cook v. Webb* (supra); *Newman v. Newman*, (1927) N.Z.L.R. 418.

Where the executor is also an applicant or a defendant he is not represented in his capacity as executor: see *E. v. E.* (supra); *Spelman v. Spelman*, (1920) N.Z. L.R. 202.

The executor may be appointed to represent beneficiaries. See *Smith v. Public Trustee*, (1927) N.Z.L.R. 342.

As to representation of beneficiaries who are absent from the Dominion, see *Heagerty v. Considine*, 34 N.Z. L.R. 905.

Infants and persons of unsound mind may be represented by the executor under Section 33 (10): *Bell v. Hunter* (No. 1), 34 N.Z.L.R. 1067; *Public Trustee v. Brown*, 34 N.Z.L.R. 951. It has been suggested however that this power should not be exercised by the executor beyond applying to the Court for advice or directions: *Re McCarthy*, (1919) N.Z.L.R. 807.

It is to be noted that there is no duty on an executor to take action under subsection 10 on behalf of an infant: *Spelman v. Spelman* (supra).

The executor may be appointed by the Court to represent infant defendants on the motion for directions as to service of the Originating Summons. The alternative course is to have a guardian ad litem appointed for the infants. See *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Re McCarthy*, (1919) N.Z.L.R. 807; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743.

7. Absent Beneficiaries.

Where there were beneficiaries who were absent from the Dominion and who were affected by the order, the Court directed that the order should remain in the Court office for such time as would allow them to come in if they so desired: *Heagerty v. Considine*, 34 N.Z. L.R. 905.

8. The Order.

Leave to apply should be reserved whenever the terms of the order are likely to require reconsideration or where the order is in the nature of a settlement: *Fox v. McDowell*, (1921) G.L.R. 157.

Where the order is involved it should be submitted to the Court for approval before it is sealed: see *Re Higgins*, (1918) G.L.R. 387.

Where costs are directed to be taxed a special form of order has been laid down: *Higgins v. Public Trustee*, (1919) G.L.R. 131.

Examples of detailed orders are to be found in *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; and *Hart v. Hart*, 17 G.L.R. 393.

9. Appeal.

There was no provision as to appeal in the Testators' Family Maintenance Act, 1900, but the Testators' Family Maintenance Act, 1906, which was passed subsequently to *Plimmer v. Plimmer*, 9 G.L.R. 10 C.A., gave a specific right of appeal and the section is repeated in the consolidating Act (Section 35).

There has been considerable difference of judicial opinion as to the jurisdiction of the Court of Appeal to review an order of the Supreme Court made in exercise of the discretion conferred on it by the Act and as to the purpose and effect of Section 5 of the Testators' Family Maintenance Act, 1906, (Section 35 of the Consolidating Act). The matter was raised in argument but not dealt with in *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A., and left open by *E. v. E.*, 34 N.Z.L.R. 785 C.A. It was again raised in *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A., and finally settled in *Rose v. Rose*, (1922) N.Z. L.R. 809 C.A., where it was held that on an appeal from an order made under the Act the discretion of the Court of Appeal is substituted for that of the Supreme Court so that the former Court is free to deal with the whole matter as the interests of justice demand.

10. Limitation of Time for Application.

See subsection (9) Section 33 (as amended by the Family Protection Amendment Act, 1921-22) and subsection (11) Section 33.

Each case will be dealt with on its own circumstances. *Newman v. Newman*, (1927) N.Z.L.R. 418 F.C. An extension of time should be granted where the failure to make earlier application arises through honest ignorance by the applicant of his rights under the Act and the other interested parties will not be prejudiced by the extension: *Hoffman v. Hoffman*, 29 N.Z.L.R. 425, 428. See also *Copeland v. Wakelin*, (1927) N.Z. L.R. 846; *Re Pulleng*, (1922) G.L.R. 339. An extension should not be granted where the applicant has been guilty of long and inexcusable delay after becoming aware of his rights: *Milne v. Cunningham*, (1917) N.Z. L.R. 687. In *Smith v. Public Trustee*, (1927) N.Z.L.R. 342, an extension was granted after a delay of seven years apparently on the ground that the circumstances at the date of the testator's death would have justified an application and remained without alteration at the date of the application. But compare *Newman v. Newman* (supra).

In *Re Roper*, (1927) N.Z.L.R. 731, the time for making application was extended from time to time for seven years. See also *Corbey v. Boonstra*, (1923) G.L.R. 433.

It was held by Hosking, J. on the terms of subsection (9) before it was amended that the application must be made within two years of the grant in New Zealand of probate of the will of the testator upon the ground that the prohibition upon the Court against hearing

an application becomes absolute on the expiration of this period: *Spelman v. Spelman*, (1920) N.Z.L.R. 202, 204. It is suggested, however, with great respect, that the subsection did not contain any such absolute prohibition. No doubt the Court would have granted an extension only on special circumstances in case of a delay of two years, but it is submitted that, even in such a case, the matter was, under the subsection in its original form, still within the discretion of the Court. However, any ground for the decision has been removed by the amendment which empowers the Court to grant an extension for an indefinite period.

It seems questionable whether Hosking, J., in deciding that an executor applying on behalf of a person who was an infant at the date of the testator's death, is limited to two years from the grant of probate, gave proper weight to the concluding words of subsection (11): see *Spelman v. Spelman* (supra).

In one case where an extension of time was granted the Court ordered the provision for the applicant to commence on the expiration of one year from the death of the testator: *Hoffman v. Hoffman* (supra).

There is some doubt as to whether there is jurisdiction to make an order imposing a charge on the estate of the testator in order to defeat the time-limit for making application under the Act. Compare *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 687 C.A., and *Toner v. Lister*, (1925) G.L.R. 323).

The application for an extension of time should be joined with the application for provision under the Act in one originating summons: *Milne v. Cunningham*, (1917) N.Z.L.R. 687.

The issue of an originating summons without service does not amount to an application under the Act: *McCarthy v. Mitchell*, (1924) N.Z.L.R. 847.

Where the applicant has intimated to the executor that he does not intend to make a claim under the Act the executor is justified in distributing the estate without waiting for a year from the death of the testator: *Sollitt v. Fairhead*, (1924) G.L.R. 533.

COSTS.

The applicant is usually allowed his costs out of the estate when he is successful. The above rule is, however, not invariable. See *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Hart v. Hart*, 17 G.L.R. 393; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Smith v. Public Trustee*, (1927) N.Z.L.R. 342; *Copeland v. Wakelin*, (1927) N.Z.L.R. 846.

When the applicant is successful all parties are generally allowed costs out of the estate: *Rush v. Rush*, 20 N.Z.L.R. 249; *Re Bleasel*, 25 N.Z.L.R. 974; *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Rowe v. Lewis*, 26 N.Z. L.R. 769; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022; *Parish v. Parish*, (1924) N.Z.L.R. 307 F.C. Contrast *Nosworthy v. Nosworthy* (supra); *Rose v. Rose* (supra); *Re Herd*, (1923) G.L.R. 118; *Corbey v. Boonstra*, (1923) G.L.R. 433; *Re Roper*, (1927) N.Z.L.R. 731. The executor receives his costs out of the estate.

The costs are sometimes fixed by the Court: *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Munt v. Findlay* (supra); *Re Bleasel* (supra); *Re Green*, 13 G.L.R. 477; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710; *Parish v. Valentine*, (1916) N.Z.L.R. 455. They are sometimes directed to be taxed by the Registrar. *Rush v. Rush*, 20 N.Z.L.R. 249; *Cook v. Webb*, (1918) N.Z.L.R. 664, 667; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Allen v. Manchester* (supra); *Pulleng v. Public Trustee* (supra); *Parish v. Parish* (supra). As to taxation of costs in such cases, see *Higgins v. Public Trustee*, (1919) G.L.R. 131.

An unsuccessful applicant is not as a rule allowed costs: *Munt v. Findlay* (supra); *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Newman v. Newman*, (1927) N.Z.L.R. 418 F.C. He may be ordered to pay costs: *Worthington v. Ongley*, 29 N.Z.L.R. 1167; *Re Green*, 13 G.L.R. 477; *Spelman*, (1920) N.Z.L.R. 202; *Sollitt v. Fairhead*, (1924) G.L.R. 533. Costs have been allowed to an unsuccessful applicant: *E. v. E.*, 34 N.Z.L.R. 785, 803 C.A.

Successful defendants are generally allowed costs: *Newman v. Newman* (supra).

GENERAL.

The Act gives the Court no power to deal with property which is dealt with by the testator under a special power of appointment: *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285.

The Act applies only to the part of his estate which the testator has disposed of by his will. Where there is a total or partial intestacy the Statutes of Distribution settle the division of the property which is not covered by the will: *Yuill v. Tripe*, (1925) N.Z.L.R. 196 C.A. This case overrules *Public Trustee v. Willis*, (1924) G.L.R. 238, and also *Brown v. McCarthy*, 26 N.Z. L.R. 762, and *Public Trustee v. Denton*, (1917) N.Z.L.R. 263, so far as they suggest that an order may be made affecting property as to which there is an intestacy. See also *Constable v. Public Trustee*, 13 G.L.R. 259.

A person entitled to the benefit of the Act cannot by contract (whether made before or after the death of the testator) deprive himself of his rights or limit them in any way: *Gardiner v. Boag*, (1923) N.Z.L.R. 739; *Parish v. Parish*, (1924) N.Z.L.R. 307 F.C.; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

Where certain of the persons who would benefit under an order were absent from the Dominion and it was not known whether they were alive their shares were reserved until enquiries could be made: *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

As to the jurisdiction of the Court to reveiew its own order, see *Carson v. Fox*, (1920) N.Z.L.R. 3, and *Fox v. McDowell*, (1921) G.L.R. 157.

As to the position of the Public Trustee while acting as committee or administrator of the estate of a mental defective, see *Re McCarthy*, (1919) N.Z.L.R. 807; *Re Koehler* (1920), N.Z.L.R. 257.

The Act applies whenever the N.Z. Courts have jurisdiction over the wills of testators, i.e., always in the case of immoveables situated within the jurisdiction, but in the case of moveables, only when the testator dies domiciled in New Zealand: *Re Roper*, (1927) N.Z.L.R. 731. See also *Munt v. Findlay*, 25 N.Z. L.R. 488.

Police Powers and Procedure.

Summary of the Royal Commission's Report.

The Report of the Royal Commission on Police Powers and Procedure, which was appointed last August, with Lord Lee of Fareham as Chairman, has presented a completely unanimous Report, which covers in great detail the matters submitted to its consideration, and makes valuable recommendations. In view of the importance of the matter, and particularly in view of the resolution passed at the last Legal Conference on the subject of the taking of statements by the police, it is proposed briefly to indicate the way in which the Report deals with certain of the aspects of the problem before it. Whilst such a summary cannot, of course, be in any way exhaustive or deal with every point of importance raised by the Report—which covers 125 pages apart from appendices—it will, it is hoped, be useful as giving in broad outline its main features.

The Terms of Reference.

The terms of reference of the Commission were :—

> "To consider the general powers and duties of police in England and Wales in the investigation of crimes and offences including the functions of the Director of Public Prosecutions and the police respectively; to inquire into the practice followed in interrogating or taking statements from persons interviewed in the course of the investigation of crime; and to report whether in their opinion, such powers and duties are properly exercised and discharged, with due regard to the rights and liberties of the subject, the interests of justice, and the observance of the Judges' Rules both in the letter and the spirit; and to make any recommendations necessary in respect of such powers and duties and their proper exercise and discharge."

The Report commences with a chapter of general observations, in which the functions of the police are considered, and certain considerations necessary to be borne in mind in embarking upon such an inquiry are pointed out. The fact that at common law a policeman is only a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily, makes the police in exercising their functions

> "to a peculiar degree dependent upon the goodwill of the general public and the utmost discretion must be exercised by them to avoid overstepping the limited powers which they possess. A proper and mutual understanding between the police and public is essential for the maintenance of law and order . . . many complaints have proved, on investigation, to be in effect directed not against the Police themselves, but against the laws which the Police are called upon to enforce . . . the attempt to enforce obsolete laws, or laws manifestly out of harmony with public opinion, will always be liable to expose the Police to temptations and to react upon their morale and efficiency."

The fact that the responsibility for police work depends primarily on the individual constable, and not on his superiors is, as the Report points out, not always sufficiently recognised. Whereas the private soldier or the artisan is supervised and controlled at his work to such an extent as to call for the exercise on his part of little or no discretion, the individual policeman has, as a matter of course, constantly to take decisions of importance both to the public and the individual citizen, and to rely on his own judgment as to what his course of action should be as circumstances arise. For this reason the multiplication of instructions or regulations is to be deprecated as tending not only to hamper the constable, but to cause him to act by the letter of his instructions rather than by their spirit.

> "What the constable really requires, above everything, is a sound grounding in the spirit and traditions of his office and in the general knowledge essential for the performance of his normal duties."

Powers and Duties in Investigating Offences.

The Report proceeds to deal with the powers of the police as to arrest and search, and with the manner in which the individual constable is made acquainted with his duties. A standard instruction book which "should aim primarily at indicating the general principles which should guide a constable in his work, rather than at laying down precise instructions with regard to every detail of his duties," is recommended, and it is stated that such a work is in course of preparation.

The difficult questions which arise, in the course of investigations into crime, with regard to the taking of statements by persons who may or may not later be accused of the offence, and with regard to whether or not a "caution" should be administered, and, if it is to be administered, when, are considered in detail. It is recommended that the caution should be retained and that it should be administered not only to persons suspected of having committed the offence under investigation, but to any person from whom it is proposed to take a formal statement.

> "Our precise recommendation is that, at the outset of any formal questioning, whether of a potential witness or of a suspected person, with regard to any crime or any circumstance connected therewith, a constable should first caution that person in the following words :—
>
> 'I am a Police officer. I am making inquiries (*into so-and-so*), and I want to know anything you can tell me about it. It is a serious matter, and I must warn you to be careful what you say.'"

This recommendation, if adopted, will put an end to the difficulty which now sometimes arises where a person not at the time suspected is invited to make a statement without any warning at all, and incriminates himself by his statement or comes afterwards under suspicion. In such cases, difficulties may at present arise, not, perhaps, as to the legal admissibility of the statement, but as to the propriety of its being read as evidence.

With regard to the cases in which a potential witness, whilst not likely to be charged with any offence, will, if called to give evidence, either have to admit disreputable conduct on his own part, or to lay himself open to a damaging cross-examination as to character, the Commission recommend that no special warning should be given. The problem of how a witness whose personal character may be involved should be dealt with came into prominence as a result of the Savidge case last year, and a provisional direction was given to the Metropolitan Police that a special warning should be given to a witness whose own character or reputation was the matter chiefly involved in the case, and whose youth, inexperience, or ignorance made some warning desirable, before any effort was made to obtain a statement from that witness. The Commission consider that no such special warning is necessary or desirable, and recommend the withdrawal of the direction in question.

As to the actual taking of statements, it is recommended that, as far as possible, employees should not be visited at work, or children at school; that where a statement is likely to be used in evidence against its maker all important questions should be recorded, as well as the answers; and that so far as practicable a statement of an accused person should be given to the Court in his own words.

> "We attach importance to this on account of the danger that a statement may imperceptibly change its meaning in the

process of passing through the mind of another person, who expresses in different, though possibly better, language, what he considers to be the true meaning of the deponent, but who has a preconception of the facts in his own mind to which he is perhaps unconsciously aiming to make the narrative conform."

On the question of the length of time occupied in taking statements, the Report, whilst not recommending the imposition of a time limit, suggests—

"The person making them should retain the right either to amend or withdraw them before being called upon to append his signature. If therefore the Police wish the deponent to sign a statement they should, except when it is of a very brief or simple character, offer him ample time (extending if necessary to the next day) to consider, and if he so desires to amend it, before signing; a copy being meanwhile retained by the Police."

Without laying down a rule that friends or legal advisers should be present when statements are taken from persons not in custody, it is suggested that in normal cases the witness should be offered the option of having them present; and that some person other than the police should always be present when a child under sixteen is formally interrogated.

On the important question as to whether powers should be given by legislation to compel the making of statements by unwilling witnesses before proceedings have been commenced, the Commission, after careful consideration, recommend no change in the present position.

"Whilst we agree that such powers would on occasion prove to be of great value, we have come to the conclusion that, on balance, we should not feel justified in recommending special legislation to deal with witnesses who are unwilling to give information to the Police."

(*To be continued*).

Audit of Trust Accounts.

A New South Wales Bill.

It seems curious to the New Zealand practitioner, who has for many years regarded audit of his trust account as a matter of course, that solicitors in New South Wales should be under no such obligation. At a time when the Profession here is taking steps to establish a Guarantee Fund, our audit provisions having been found not an absolute safeguard, our colleagues in New South Wales are viewing with somewhat mixed feelings a Bill now before their Legislature making provision for the first time for the audit of solicitors' trust accounts. Every solicitor and conveyancer is by the Bill required to pay trust monies into a separate bank account and to keep such books of account as will enable the account to be conveniently and properly audited. A solicitor or conveyancer must produce all books and vouchers and give all information reasonably required for the purposes of the audit, and his bankers may be called upon to disclose the position of his private or trust account with them. In case of neglect to have the account audited, the Attorney-General may have it audited at the expense of the defaulter. Trust moneys held by a solicitor or conveyancer jointly with a co-trustee who is not a solicitor or conveyancer are, provided proper accounts are kept by the trustees and a regular and proper audit is made, excluded from the operation of the Bill except so far as such moneys come into the hands of the solicitor or conveyancer in the course of his business. Non-compliance with the provisions of the Bill is deemed to be professional misconduct and, in addition, the offender is liable to a fine not exceeding £100.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "New Zealand Law Journal" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(*Continued from page 125*)

The following characteristic letter from Hardinge Giffard to his father was written in 1856 when he was acting as Revising Barrister in South Wales.

"St. David's, October 11, 1856.

"My Dear Father,

As you will see by the date, we have "given to St. David's two true Britons more," though I certainly never thought, when I read that line, ever to be there, still less to approach it in the way of official duty. I recommenced revision circuit on Thursday at Kilgerran, slept at Cardigan that night, took Newport (Pemb.) and Fishguard yesterday, at which latter place I had more trouble than usual, seeing that party spirit runs high there, and they fought bitterly over all the borough votes that were capable of controversy.

To-day I have finished the revision of Pembrokeshire, having taken a place in my way where there is a fair but once a year, and that once happened to be to-day. Such a hubbub and confusion as there was, it would be difficult to overstate. The pigs and young women squealing in every key, the former at being dragged along by ropes fastened round them like the cross bands of our soldiers' knapsacks, the latter at being tickled by their too-attentive lovers, though whether their resistance was due to the publicity of the attentions, or the attentions themselves, I will not undertake to say.

The favourite costume of the gentlemen was a very flat hat, and a bright blue tailcoat with brass buttons, the tail reaching down nearly to the ground, breeches proper, not trousers, and buff gaiters with brass buttons. Most of the gentlemen had two ladies with him, one on each arm, and certainly he might be less pleasantly situated, for I doubt much if St. Kevin of blessed memory would have kept all his resolutions if he had lived in this part of the world, or at all events if he had ever gone to the Mathey fair. I do not think I ever saw so many beautiful women together as I did to-day. We got here in time to go over the Cathedral, and heard a great deal about St. Patrick from the parish clerk, who, primed I expect by a tribe of Oxford divines, who it appears have been here archaeologising, always speaks of the Virgin Mary as "the Blessed Virgin." There is a very curious piece of carving under one of the seats of the choir, and only visible on the seat being turned up. It is of a priest with the face of a fox giving with one hand the wafer to a goose with a human countenance, while behind his back he holds a bottle of wine with the other. A somewhat dangerous libel I should think, at the time the artist designed it, and scarcely rendered safe by the place of exhibition, or concealment, whichever it is to be called. We hope to attend service in the Cathedral to-morrow, and on Monday I am due at Glamorganshire sessions, which begin at Swansea. We have not yet been to St. David's Head, but mean to get there to-morrow after church if we can.

Sunday, October 12.

We went to the Cathedral this morning at 11, and after that started, in spite of mud and weather, for St. David's Head. We got wet as we expected, but were rewarded for our adventurousness by seeing the wildest and most desolate looking scene we have either of us ever seen. Ramsey Island and Whitesand Bay a little relieve the grim blackness of the rocks on St. David's Head. Beyond seeing a pig the colour of red ochre, and having my umbrella blown inside out, we met with no adventure, and with nothing and nobody, all seemed as if the foot of man had never trodden the place before; everything was one solemn solitary grim frown of black rocks. On one side of the hill there are the traces of what the book calls a submerged forest, but it looks like masses of half petrified trees, just emerging from the earth below, and between the rocks.

We shall not be sorry to get away from this, for the Hotel, as it is pleased to call itself, is miserably furnished with everything I was rash enough to order—a pint of sherry yesterday and the bottle stares me in the face at this moment, not likely to lose its contents, except that I think that I ought in Christian charity to future guests, to throw it out of the window. We have tumbled across a Chester client here, who with his wife and son is working his way back to Chester from Tenby and has taken this town on his way. He, moreover, brave man, is going to look at the Head, with a guide! and a post-chaise, to-morrow in the orthodox way "*miror imagis.*" There is some virtue in a stout pair of legs, and we can boast two between us. The possessor of the inferior pair received, and is much obliged for, a letter from Mary. The owner of the first-rate pair returns thanks to Harry for his notes, one containing a telegraphic message, and the other the lamentable history of Lord Lawrence. Give my love to Todgers. Your affecte. son,

HARDINGE GIFFARD.

Caroline sends love, but protests that my legs are not better than her own."

It was not only at Parliamentary elections that Giffard had to fight, for six months after he had returned to London he received this letter, which was followed by the most extraordinary scene ever witnessed in a Court of Law, in which he figured prominently.

From HENRY FRESHFIELD, Esq. 5 Bank Buildings, E.C.
June 23, 1869.

MY DEAR MR. GIFFARD,

The case my nephew wrote to you about affects Lord Carrington, the son of an old friend—and with whose family we have been intimately connected for very many years.

Lord Carrington is 25, and yesterday horsewhipped Mr. Murray, the proprietor and editor of *The Queen's Messenger*, for a gross attack on his father.

If he should be summoned, we should esteem it a personal favour if you would defend him. My nephew doubted if you would go to a police office, but I think we could arrange to meet your convenience, the question being one of great importance to the family, and they would be fortified by your advocacy. Do not reply to this.

Yours faithfully,
HENRY N. FRESHFIELD.

Giffard undertook the case, and accordingly appeared at Marlborough Street Police Court on July 7, 1869, when Lord Carrington was charged with assaulting Mr. Grenville Murray, editor and proprietor of *The Queen's Messenger*, a journal which had gained an evil notoriety by its scandalously libellous articles on public men.

Grenville Murray, known as "the roving Englishman," was a natural son of the Duke of Buckingham, and was one of the most brilliant and racy writers of his time. He had published in *The Queen's Messenger* an abominable libel on the second Lord Carrington, and his son, the third Earl, had publicly horsewhipped him in St. James' Street, when he was coming out of his club.

For this assault, Grenville Murray was ill-advised enough to issue a summons against Lord Carrington. The object of the defence was to prove that Grenville Murray himself had written the article, and, therefore, richly deserved his castigation.

After a lot of conflicting evidence had been heard including a counter-charge of perjury against the prosecutor, the magistrate adjourned the case.

Scarcely had he announced his intention to do so when a rush was made by some of Murray's friends for a box, which it was alleged contained MSS. stolen from *The Queen's Messenger* office, and intended to be used in the perjury charge. Around that box raged for nearly a quarter of an hour a fight as fierce and fell as that for the body of Patroclus, or that described by Macaulay in the "Lays" over the corpse of Valerius. Noble lords, eminent Queen's Counsel, solicitors, clerks, witnesses, to the number of thirty or forty, were engaged in that desperate mêlée.

Hats were smashed, eyes blackened, noses set bleeding, glasses broken, inkstands hurled to and fro, till at last a strong body of police quelled the riot, and ejected the furious combatants.

Hardinge Giffard, who had been in the thick of the fighting, using his fists vigorously, emerged from the Court with flushed, bruised, perspiring face and shirt-front drenched with ink, *but with the box.*

The magistrate, Mr. Knox, looked on aghast and horror-stricken at such a scene, which one would imagine had never been witnessed before or since in any English Court of Justice.

Grenville Murray funked facing the perjury charge. A warrant was issued for his arrest, but he bolted, and was outlawed. But he had the audacity to return to England more than once, and was on one occasion recognised in disguise at the printing office of *The Queen's Messenger*, which paper died the week after its editor's disappearance.

Subsequently Grenville Murray was associated with Edmund Yates in the production of *The World*, and died at Passy on December 20, 1881.

When Lord Halsbury saw this account, he approved it as correct, except that it did not mention the two black eyes which he had received and several more that he had bestowed.

(To be continued)

Judicial Ignorance.

Nowadays Judges do not, as much at all events as was the case some years ago, feign ignorance when on the Bench of the happenings in the world. For instance, Shearman, J., had recently before him a case dealing with films, cinemas, and film artists, and he successfully resisted any temptation to ask, "What is a film?" and "Who is Charlie Chaplin"; and the same learned Judge only a few days later in *Sideli v. Duophone Syndicate Ltd.*, informed counsel that a jazz band always and intentionally has a burr.

Correspondence.

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

Sir,

In the special Wellington Conference number of your Journal, dated 30th April, 1929, I notice that Mr. M. J. Gresson, in speaking to a remit, is reported to have stated that Batchelor, a defaulting solicitor who was recently prosecuted in Christchurch, had been a clerk in the Public Trust Office. This is inaccurate, for Batchelor has never been employed in the Public Trust Office or in any other Government Department.

I trust that you will see your way to publish this letter in order to remove any misapprehension which the misstatement may have caused. I am, etc.,

J. W. MACDONALD,
Public Trustee.

Wellington,
16th May, 1929.

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

Sir,

Divorce or Dissolution?

Section 10 of the 1928 Act gives to a petitioner in divorce the right to present to the Court a petition praying for a divorce from the other party to the marriage. Prior to the passing of this Act the prayer was always that the marriage of the petitioner with the respondent should be dissolved.

In the latest edition of *Sim on the Divorce and Matrimonial Causes Act* the old form of petition praying for a dissolution has been retained, and consequently there seems to be some doubt as to whether it is now correct for a petitioner to pray for a divorce from the other party or for a dissolution of marriage as before.

As the new Act has been in force for several months now, this point of practice may have been considered by the Court, and if so, it will be useful if any of your readers can advise through your columns what is the correct practice. I am, etc.,

"SOLICITOR."

Wanganui.

Rules and Regulations.

Auctioneers Act, 1928. Declaring Special Districts under the Auctioneers Act, 1928. Gazette No. 25, 11th April, 1929.

Fisheries Act, 1908. Regulations re use of nets for taking fish in certain waters.—Gazette No. 25, 11th April, 1929.

Government Railways Act, 1926. Alterations to scale of charges upon the New Zealand Government Railways.—Gazette No. 25, 11th April, 1929.

Orchard Tax Act, 1927. Certain Commercial Fruitgrowing Districts made subject to the provisions of the Act.—Gazette No. 25, 11th April, 1929.

Samoa Act, 1921. Samoa Prisons and Constabulary Order, 1929, re constitution and payment of Samoan Constabulary and management of Prisons.—Gazette No. 25, 11th April, 1929; Samoan Health Amendment Order.—Gazette No. 31, 2nd May, 1929.

London Letter.

Temple, London,
26th February, 1929.

My dear N.Z.,

The weather is really abominable, and, for all the kind feelings I have towards you, I refused to budge from my room, when this morning one of your brethren looked in upon me to be taken down to the Privy Council to see the legal sights there, and I sent a young and hardy pupil in my place, pleading to urgent paper business before my fire. Nine of the High Court Judges are ill, with various kinds and degrees of influenza; and I do not blame them. If I was on salary, I should stay at home and be ill myself.

At a table in Hall, at lunch to-day, I observed in progress a brave effort to make the best of a bad day. It is a table next door to our own, also occupied by Old Hands. Before each of them was a glass of Brown Sherry; and a fellow-luncher, who came in with me, suggested that we might well find our own table too full to receive us and sit ourselves amongst the sherry drinkers. We could hardly be excluded from the treat could we? We did not, however, adopt this unscrupulous suggestion: which shows you that the morality of the English Bar is still on a high plane. And the occasion of this orgy, next door? Lionel Cohen's silk gown. I believe it is the rule, if anyone knows of it, that upon the arrival of a new silk to lunch in Hall, his table may call upon him for free drinks to celebrate. Cohen is a Chancery man who has made enough as a Junior in the past, and must make enough as a leader in the future, to be able to face this tax upon his progress. Other silks are Somervell and Eales, as I told you, but not Dickinson, as I am afraid I did also tell you. Hildersley is a great rating and all-that-sort-of-thing expert, and a man of standing and esteem. Sir Frederick Liddell you have head much about; he will never lead in Court, having won the position of Counsel to the Speaker and having lost very many years ago his powers of public speech in the very different business of drafting Bills of Parliament. Few though the new Silks comparatively be (and it is rumoured that the present Lord Chancellor has deliberately renewed a formerly-practised and somewhat severe discrimination among the applicants), there should be much Junior work let loose as a result of their elimination from the back benches; Somervell, on the Common Law side, and Cohen, on the Chancery side, should be Juniors the sight of whose departing backs should be particularly welcome in this behalf.

The *Hobbs v. Tinling and Co., Ltd.*, case, in which there was that much ado, of which I have told you, about the Lord Chief Justice's conduct of a *nisi prius* trial, is over and done with, and most people have forgotten all about it and retain only the memory of the Irish eloquence therein of Serjeant Sullivan. That Serjeant, as you know, is not of the old English rank of Serjeants, whose last survivor went some while ago. He is a Serjeant on the Irish side of him. The origin of this curious term "Serjeant" was one of the many thrillingly interesting origins discussed the other night by that learned academic of the law, Herman Cohen who has nothing to do with the Lionel Cohen aforementioned. He lectured upon these matters in the Inner Temple Hall, early in our current fortnight; and, in

a thesis intituled "The Origins of the Legal Profession in England," went back far behind the conquest and carried us to the early beginnings of the ecclesiastical jurisdiction which apparently comes first of all. I pause, at this point, for you to rise and remove your hats, in a tribute of respect for the Chancellor of the Ancient Jurisdiction, who addresses you! I am glad to think I got busy some centuries before the rest of you.

"Serjeant" is, as I did not know but you did, the corruption of "serviens," and the Junior Bar apparently began existence as "apprenticii." The idea of old Bremner, our senior junior, as an apprentice still, after a good half century of practice or more, is a pleasing one. However, there it is; the junior bar began as apprentices and the Inns began as the lodgings they nstalled themselves in, when King Henry, in 1234, closed down the City Law Schools in sweet sympathy for the welfare of the Oxford School of Law, likely to flourish to its better satisfaction if relieved of competition. In 1379 all the barristers, servants or apprentices, were taxed; and about the same time the machinery of the State was employed to enact, and enforce, greater simplicity of dress among at least the stuff gownsmen. All very interesting, and mostly to be read, I gather from Lord Justice Sankey's remarks (as president at the meeting where the lecture was delivered), in Mr. Cohen's recently published book: "History of the English Bar." The origin of the wig and gown, speaking generally and without particular reference to the various distinctions and finesse, is that which most intrigues the public but is really the least peculiar; it is not that we sometime or other initiated that marvellously effective gear, it is (as again you know; but you must let me spread myself a little, as I happen to know it too) that everyone else sometime or other stopped wearing it. The Bibs are apparently the relic of the ecclesiastical collar, which again brings into the prominence that it deserves this agreeable subject of Chancellors and Ecclesiastical Jurisdictions . . . . Horridge, J., by the way, is a keen and profound student of these matters, and is to be consulted by those who would dig deeper into the subject at least of wigs, and, I also suppose, gowns.

The decision of Romer, J., as to the charitable nature of bequests to found and maintain homes for animals, even animals naturally tending to be a nuisance to society, has been reversed by the majority of the Court of Appeal, Lord Justice P. O. Lawrence being the dissenting Lord Justice and agreeing with Romer, J., *Re Grove Grady: Plowden v. Lawrence.*

The next most interesting case of the period is, if you are interested in motor omnibus propulsion and especially in that ingenious type of engine in which the power is passed from the petrol engine to the driving wheel through the medium of an electric dynamo, *Tilling Stevens Motors Ltd. v. Kent County Council.* The House of Lords (and it is a pleasant thought to think of their Lordships involved in a Tilling-Stevens motor omnibus, in their select numbers) decided that for licence purposes such a vehicle is still electrically propelled, notwithstanding that the propelling power is really an internal combustion engine, propelling the dynamo and through it the vehicle. Lastly as to recent cases, and on a matter which may concern you as laymen no less than it concerns you as lawyers, the not-so-very-long-ago decisions in *Levene v. The Commissioners of Inland Revenue, Lysaght v. Commissioners of Inland Revenue* have given rise to the publication of a leaflet by the Inland Revenue, upon the subject of residence in this country and the effect and extent of the incidence of income tax which it causes: the leaflet is addressed to "Visitors from the Dominions and Foreign Countries," and it is subscribed by the signature of "Gordon Spry" who is not only the most entertaining teller of funny stories I have ever met, but is as able a Secretary as the Board of Inland Revenue can ever have had. I strongly advise you to become possessed of this most illuminating and informative sheet, whether you are contemplating a visit to this country, on leave, or whether you wish to be prepared for the sudden questions which are shot at us lawyers, on such matters, and by which the very depths of our ignorance are plumbed by the test of us upon a fundamental point of everyday life.

In Parliament the Local Government Bill has fared with comparative ease and comfort past the House of Commons and into the House of Lords, there being less of a battle royal over the abolition of Guardians than there was over the threat, since modified, to extend the powers of the Executive to legislate on its own. Clause 111, which dealt with this subject and gave power to the Minister to reform the law on his own when this might be necessary, "for the purpose of removing difficulties," (O admirable object!), caused much dissension, the Houses being very sensitive and fidgetty, as also is the Press, upon the subject of departmental legislation, a growing obsession and a matter very much and cleverly canvassed by our Lord Chief Justice of recent years. The House of Lords, without waiting for the Local Government Bill to come along, has also got busy on the same subject, in connection with the Factory and Workshop (Cotton Cloth Factories Bill, and Lord Carson has made a great declamation upon the growing evil. The feeling of the public is not very discriminating in the matter: It prays heartily and with reason that everybody may stop legislating for a while, the Houses of Parliament and the Departments alike: the laws enacted by both are equally tiresome, equally unintelligible, equally excessive; and it makes no difference to the poor man in the street, bravely attempting to obey even if he cannot understand them, whether they are on the Statute Book or not, whether they have or not the odious character of being Rules and Regulations only. . . .

Yours ever,

INNER TEMPLAR.

Court of Arbitration Sittings.

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

Nelson: 31st May, at 10 a.m.
Westport: 5th June, at 10 a.m.
Reefton: 6th June, at 10 a.m.
Greymouth: 7th June, at 10 a.m.
Hokitika: 10th June, at 10 a.m.
Christchurch: 18th June, at 10 a.m.
Wellington: 8th July, at 10 a.m.

Obituary.

Mr. E. Y. Redward.

In the late Mr. Ernest Yevily Redward, who died suddenly on 15th May, the State loses a valued servant, and the Profession a member the extent and responsibility of whose work hardly received in his lifetime the recognition due to it.

Born at Wellington, in 1869, he was educated at Wellington College, topping the Junior Civil Service Examination list in 1884. In the following year he became a junior clerk in the Public Works Department, and in 1888 was transferred to the Crown Law Office, where he remained for thirty-seven years. He was admitted as a barrister and solicitor in 1895, and in 1907 received the title of Assistant Law Officer, the title being changed in 1917 to that of Crown Solicitor. He also for many years held the office of Revising Barrister for the Dominion under the Friendly Societies Acts. In 1925 he left the Crown Law Office, nominally to retire upon superannuation, but actually to assume the position of Compiler of Statutes for the Dominion, and he remained in harness till the day of his death. Before its reorganisation by Sir John Findlay in 1910, the work of the Crown Law Office was chiefly of an advisory character, and Mr. Redward never went into Court. This was probably why he declined the position of Solicitor-General on the elevation to the Bench of Sir John Salmond in 1920.

His detailed knowledge of the contents of the statute book and of the *minutiae* of administrative law was unparalleled in the Dominion, and he was relied on for legal guidance by the executive officers of every Government Department, many of which had developed and ramified from small beginnings during the years of his service. With the annexation of the Cook Island Group the scope of administrative responsibility was widened, and Mr. Redward's connection with it was marked by his compilation of Island Laws issued as an official publication in 1905. The European War threw on the Crown Law Office a sudden burden of settling emergency regulations and many other classes of documents not made public, and of advising in novel cases for which no New Zealand precedent existed. In this work Mr. Redward loyally assisted his chief, the late Sir John Salmond. One part of his work at this time is on record in his compilation of "The War Regulations Act and Regulations Thereunder," an official publication carefully edited and copiously indexed, the first edition of which appeared in 1915, and the fifth in 1919. In the preparation of the Consolidated Statutes of 1908, Mr. Redward occupied a responsible, though subordinate, position. Besides being responsible for the final proof-reading, he supplied to the Commissioners, with whom he was in daily touch, critical notes on every draft compilation as it passed through his hands. The Commissioner's estimate of his work is on record in the following passage of their report of 28th July, 1908:—

> "We desire to express our appreciation of the services rendered by Mr. Redward, Assistant Crown Law Officer. He possesses an accurate knowledge of the statutes, together with a special gift of method, and has served us with conspicuous ability and zeal."

As Compiler of Statutes Mr. Redward had a freer hand, and the quantity and standard of his work are on record in the consolidating Acts which appear in the statute books for the years 1925 to 1928. It was, however, as Editor of "*The Index to the Laws of New Zealand*," still familiarly known as "*Curnin*," that Mr. Redward deserved best of his fellow-practitioners. When Mr. John Curnin, on his retirement from the Civil Service, made his copyright a gift to the State, Mr. Redward was, on Mr. Curnin's recommendation, appointed to carry on the publication, and the first edition issued under his editorship was the tenth, brought down to the end of the session of 1896. The 26th edition, brought down to the end of the year 1928, was issued only a few months ago. For more than thirty years the whole of the work of this publication was done by Mr. Redward personally, and it grew under his charge from a volume of 229 pages to one of 464 pages.

The late Mr. Redward's temperament was genial and even. In earlier days he was a prominent rugby half-back and subsequently took an active part in tennis and the control of tennis. "It was in keeping with his whole character," an intimate friend observes, "that as goal-kicker for his team he always took charge of the ball after a game, and produced it for the next match in a condition of perfect symmetry of seam and shape."

Bench and Bar.

Mr. Guy Norman Morris, solicitor, of Auckland, has been appointed a Stipendiary Magistrate, to fill the vacancy caused by the appointment of Mr. J. H. Luxford, S.M., as Chief Judge of Samoa. Mr. Morris was a Clerk of the Court for five or six years. He served in the War and returned as a lieutenant, wounded. He was appointed Clerk of the Court at Tauranga, and he was later, for five years, administrator at Niue Island. He also served as Collector of Customs at Fiji for two years being, during that time, on loan from the Justice Department. On his return, he was in the Official Assignee's office at Auckland, and shortly afterwards he was appointed Official Assignee there. Mr. Morris is the Public Service nominee on the Public Service Appeal Board.

Messrs. Torrens and Laurie, Auckland, have dissolved partnership. Mr. R. J. Torrens is retiring from practice and Mr. F. N. Laurie will continue to practise on his own account.

Messrs. M. O. Barnett and P. Keesing, of Wellington, are amalgamating their practices. The firm will be known as Barnett and Keesing.

Mr. J. de V. W. Blathwayt, LL.B., lately of the staff of the Public Trust Office, Gisborne, has commenced practice in Gisborne on his own account.

Our professional reverence for the law is so great that we recoil from the idea of laying it on the laboratory table as we should from that of plucking out our own entrails and re-arranging them in better shape.—SIR MAURICE AMOS.

Legal Literature.

Lord Reading.

A Biography; by C. J. C. STREET (Geoffrey Bles).

When one sets out to write of the life of another, one should keep in ones mind the thought that the great lesson to be gained from a biography is to learn what man can be or do at his best. Such was the thought of Samuel Smiles who also added: "A noble life put fairly on record acts like an inspiration to others." It is not easy to write within a few short years of a man's death a true or fair record of that man's career; and to write the record of a living man presents many obvious difficulties. With all these disadvantages to contend with, however, Mr. Street has written a most interesting account of Lord Reading. The biographer is apparently well acquainted with the subject of his writing and is a fervent admirer. With his views it is safe to predict that the English Bar is in complete accord. The story reveals the falsity of the popular belief that a lawyer is not of much use in other spheres of life. Lord Reading and Lord Birkenhead are brilliant examples of men successful both in law and in business.

Longfellow justly said that a life that is worth writing at all is worth writing minutely. Mr. Street's book is not minutely written, but that is perhaps impossible while the subject is yet living. Lord Reading's life is, however, fairly traced from early youth. His scholastic career indicated no great future. He was of a restless disposition, striving to find his proper niche in this world. He learnt from a voyage to India as ship's boy that it was not to be found at sea. The Stock Exchange gave him much experience, but he was not restful there. His subsequent decision to abandon the City for the Law found the niche he was seeking. In character Rufus Isaacs seems to have possessed all the manly qualities. His popularity seems to have been established at once at the Bar and never to have waned. His success was founded in the police and county courts. His relatives were able to test his abilities early in his career with some heavy litigation in the High Court, and the load was carried without difficulty. His industry was great and his ability so marked that he became sought after very rapidly by litigants. Mr. Street reveals a brilliant career at the Bar, and gives some interesting details of cases fought.

Rufus Isaacs, recognising a duty to work for the public weal as well as his own interest, entered Parliament in 1904 as a Liberal. His behaviour during the bitter campaign conducted by Mr. Lloyd George is a happy contrast to the general behaviour of the Liberal party in 1909. He was regarded as a man of such wise judgment that it makes rather sad reading to hear of his share in what was known as the "Marconi Scandal." If it were not for his unquestionable probity, his explanation that he did not mention he had taken shares in the American Marconi Company as it did not occur to him that it was pertinent to the particular inquiry of his interest in English Marconi Shares, would have been hard to understand. His high character stood him in good stead in a most trying situation, and when that inquiry was concluded the world knew Rufus Isaacs as a man whose integrity was not in doubt.

Than Lord Reading few, if there are indeed any, did more for the British Empire during the War. As a special envoy from Great Britain to the United States he paid several visits and with great judgment, tact, and understanding arranged matters of finance and munitions to his own great credit and his Country's advantage. When he received his office of Lord Chief Justice after the War it was only for a short while until he was appointed Viceroy in India. Here again, although with a national racial disadvantage in India, he met and coped with the full fury of Bolshevik enterprise.

The life of an eminent Lord Chief Justice of England is always likely to be interesting reading. When that life is of a man endowed with the most noble characteristics, and comprehends an experience of commerce as well as law, of high diplomacy and vice-regal duties, that life must be, and, indeed, in this case most assuredly is, excellent reading.

—C. A. L. TREADWELL.

Justice of the Peace and Local Government Review Annual 1928.

Edited by ALBERT LIECK.
(Pp. viii, 192, ii: Butterworth & Co. (Publishers) Ltd.: Shaw & Sons Ltd.)

One of the most interesting books concerning the law that this reviewer has for a long time had in his hands is the *Justice of the Peace and Local Government Review Annual* for 1928. It is a collection of some of the articles of more permanent interest that have from time to time appeared in that eminent legal newspaper, but its scope is not confined to articles published in the year mentioned in the title. The selection is wise, as one would, of course, expect under the editorship of Mr. Lieck. The opening section of the book treats of the administration of justice and some five or six articles are there collected, each of which should interest all concerned with or engaged in the actual administration of justice. The greater portion of the work is devoted to articles dealing with different points in criminal law frequently arising before inferior courts, such, for example, as public indecencies, soliciting, contempt of court, evidence of bad character of accused persons, evidence of conduct on other occasions, corroboration in bastardy. There are some valuable articles dealing with the police and prisons, and articles on many other subjects falling within the jurisdiction of justices. No solicitor whose practice takes him into the police court will fail to find this a useful volume.

New Books and Publications.

Butterworth's Twentieth Century Statutes. 1928 Volume. (Butterworth & Co. (Aus.) Ltd.). Price 26/-.

Butterworth's Yearly Digest, 1928. (Butterworth & Co. (Aus.) Ltd.). Price 24/-.

Sim's Divorce and Matrimonial Causes Act and the Rules Thereunder. Fourth Edition. By. W. J. Sim, LL.B. (Whitcombe & Tombs Ltd.) Price 21/- (Cloth); 25/- (Half-calf).

Jurisdiction in Marginal Seas. By W. E. Masterton. (Macmillan & Co. Ltd.) Price 24/-.

Everyday Statutes. Annotated by S. E. Williams (4 Volumes). (Sweet & Maxwell Ltd.) Price £9/5/-.