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"If the scales of justice hang anything like even, throw into them some grains of mercy."

—*Lord Kenyon.*

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Right to Interview Witnesses.

Recent proceedings have given rise to the suggestion that the Crown in criminal cases claims a right in the nature of a preserve over witnesses which its officers have interviewed. It is difficult to see how such a claim can be sustained, and if there is any justification for it the limits of the right will need to be clearly defined. We understand that the New Zealand Law Society has set up a Committee to enquire into the position and the alleged claim by the Crown.

If a claim of this nature can be supported when it relates to witnesses in a criminal case, can such a claim be maintained in regard to witnesses in civil cases? When the question was as to whether the course of justice had been interfered with by keeping a witness out of Court, the distinction between such an offence in a civil and a criminal case was made by Williams, J., in *Schlesinger v. Flerscheim*, 2 Dow. & L. 737, and, if it were rightly made there, it seems it must be made in determining the limits, if any, placed upon parties or their solicitors, of opportunity to interview witnesses known to have been subpoenaed by the other side. We have not been able to find any authority for any proposition that in terms limits the right of a party or his solicitor to interview any person at all whom he considers may be able to give evidence on the facts involved in litigation in which the party is interested. Nor do we think it likely that authority for any such proposition can be found because such a principle would be rather subversive of justice than in furtherance of it.

Interviewing the other side's witness may be evidence of an attempt to interfere with the witness and so pervert the course of justice, and in consequence dangerous to the party proposing such interview. Professional etiquette may also place desirable limits on the right to interview witnesses who are, in fact, known as the other side's witnesses. The principle that a witness is not to be persuaded from giving evidence against a person is well established, the reason for the rule being that such a course, if permitted, would prevent the due execution of justice. It is laid down in *Hawkins' Pleas of the Crown* that: "All who endeavour to stifle the truth and prevent the due execution of justice are highly punishable and also all those who dissuade or but endeavour to dissuade a witness giving evidence against a person indicted." So in *Rex v. Lawley*, 2 Strange 904, the information was for attempting to persuade a witness not to appear and give evidence against one Japhet Crooke for forgery. Such an offence has, however, to be proved as strictly as any other offence. Interviewing the other side's witness would unquestionably, in the absence of writing establishing the offence, be evidence at any rate of opportunity to commit the offence. Because of the dangerous inferences that can be drawn, solicitors have always been chary of taking part in such interviews unless notice has been given to the other side. On the other hand, properly enough, the danger has not prevented solicitors from engaging in such interviews when it appears that the interests of their client demand them.

Professional etiquette, if it demands in most cases notice to the other side that one of his witnesses is going to be interviewed, has not always demanded a similar notice to the police when criminal proceedings are involved. There seems good reason for such distinction. The police in criminal cases and in semi-criminal cases search for evidence and take statements from all and sundry. Such persons do not, by reason of visits from the police, become Crown witnesses. A claim by the Crown that all persons interviewed by the police should be regarded as closed to interview by a party involved or his solicitors would be intolerable, nor does it seem reasonable that notice should be given to the police that interviews are being sought with such persons. Such a course could only lead to injustice. A great number of people so interviewed by the police may be able to give evidence of the utmost value to a person accused and the person accused should not be debarred from obtaining, if he can, such evidence. Highway collisions may lead to both criminal proceedings and civil proceedings. The possibility of criminal proceedings and the statutory necessity laid on the parties to give notice to the police when a collision occurs and injury to the person is occasioned, makes it obligatory on the police to interview and obtain statements from practically all those who witnessed the collision. A party to a collision who knows that civil proceedings are inevitable as a result of a collision, is under the same necessity to obtain all relevant evidence from witnesses of the accident, and it would be monstrous that such a party should find himself restrained from collecting evidence by reason of the fact that all available witnesses had been gathered in the police net or by the other party to the collision.

Evidence can be looked for without force or fraud being used, and witnesses can be seen without any attempt being made to induce them to give false evidence or to dissuade them from giving evidence at all. There is not the slightest reason to suppose that the Bench regards this important duty that constantly falls to the lot of a solicitor acting in litigation as being improperly discharged, and there seems no need to establish a wider proposition on this subject than the one that has been laid down for centuries. The necessary proposition is clearly set out in the extract from *Hawkins' Pleas of the Crown* set out in the beginning of this article. Nothing wider seems required. In *Clements v. Williams*, 2 Scott 814, Tindall, C.J., found that the defendant was fencing-off service of the process of the Court and keeping the witness out of the way. Such a course of conduct he described as an offence against justice and punishable by attachment, but in that case and in *Smith qui tam v. Bond*, 2 Dow. & L. 460, and in *Schlesinger v. Flerscheim* (*cit. sup.*) the learned Judge presiding seemed distinctly adverse to enlarging a just, necessary and serviceable principle beyond the limits clearly defined by the language in which it has been from time to time embodied.

Supreme Court

Blair, J. June 22; September 23, 1929.
Auckland.

IN RE ZWIES.

Probate and Administration—Executor—Costs—Executor Not Disclosing Existence of Codicil on Application for Probate of Will—Pecuniary Legatee Under Codicil Lodging Caveat—Executor Having Honest Doubts as to Validity of Codicil and Intentionally Omitting Reference to Codicil with View to Having Question of Its Validity Determined—Duty to Disclose All Testamentary Documents—No Misconduct in Circumstances—Caveator's Costs Ordered to be Paid Out of Estate—Order Making Executor Personally Liable for Caveator's Costs if Residue Insufficient Refused.

Motion for an order *nisi* for probate of a will, the motion being opposed by a caveator who claimed to be entitled to an interest in the estate under a codicil. The deceased made a will on 31st January, 1928, appointing R. K. Trimmer his executor and leaving his whole estate to one R. P. Boag a stranger in blood. On 21st January, 1929, deceased executed a codicil leaving £600 to his sister Lina Nortman, the codicil being witnessed by two reputable persons in Whangarei, one of whom was a medical practitioner. The deceased died on 23rd January, 1929. On 11th February, 1929, a caveat was filed on behalf of Mrs. Nortman. On 14th March the executor named in the will, who was a solicitor, filed a motion for probate of the original will, and in the executor's affidavit omitted all reference to the codicil. The affidavit of death prepared by the executor was by Dr. Ward, the medical practitioner who attested the codicil. The estate was sworn as under £800. On 8th May the executor filed a motion for an order *nisi* for probate of the will unless cause was shown by the caveator within 14 days of the service of the order. An order *nisi* was sealed on 10th May, cause to be shown within 30 days, but it did not name a time for showing cause. The caveator being embarrassed by this then moved to set the order aside or alternatively for a time to be fixed. Costs £2 2s. 0d. were allowed to the caveator and the hearing of the motion was adjourned, leaving parties to arrange for a date of hearing and bring the facts before the Court. Thereafter the caveator filed affidavits from the attesting witnesses to the codicil, exhibiting it, showing that he was in full possession of his mental faculties at the time of execution of the codicil, and proving due execution. On the date arranged for hearing the executor had not answered the affidavits nor offered any explanation why he had disregarded the codicil as a testamentary document. An adjournment was applied for on this account so as to enable him to file affidavits. On 11th June he filed an affidavit setting out his reasons for moving for probate of the will only. He was solicitor for the testator, and discussed his will with him shortly before his death and had never heard of the sister, and Boag, the beneficiary under the original will, was disputing the validity of the codicil. There being in Mr. Trimmer's mind some question as to the validity of the codicil, he adopted the course he had taken so as to enable the question of validity to be settled.

Turner for executor.
Kirker for caveator.

BLAIR, J., stated that he thought the proper course for an executor to take, when there was more than one testamentary document was to disclose all such documents on application for probate, even if the executor doubted the validity of some of them. But the executor in the present case took what he honestly believed to be the proper course, and he was aware of the codicil and knew that the interests of the caveator would be looked after. It was suggested that costs should be visited on him because he was aware of the codicil and could easily have verified the testamentary capacity and the due execution of the same. At the adjourned hearing counsel for the executor abandoned as far as the executor was concerned any suggestion of invalidity of the codicil, and had since filed an affidavit by the executor swearing faithfully to execute the will and codicil if probate was granted. The codicil as well as the will, had been duly proved valid, and probate of both was therefore granted. The estate was sworn at £800 and the specific legacy to Mrs. Nortman was £600. Counsel for the caveator asked for her solicitor and client costs as against the executor, and that the executor should be permitted to charge the caveator's costs and such of his own costs as were referable to the proceedings against the residue of the estate and not otherwise, so that no portion of the caveator's share would abate for costs. It was also asked that, if the residue was not sufficient for all those costs, the executor should personally pay the amount so as fully to indemnify the caveator's share of the estate from any costs referable to the present proceedings. The order asked, therefore, was for a personal order against the executor for the whole of the caveator's solicitor and client costs, with a right to him for reimbursement out of the residue only. **Wilkinson v. Corfield,** 6 P.D. 27, was relied upon as authority not only for the caveator's full costs, but also as authority for visiting costs on the executor personally. The principle enunciated by the President of the Court in that case was that a legatee having propounded a codicil made in her favour and having succeeded, was entitled to her whole costs, the ground being that the executor, if he had done so, would have been entitled to his costs, and she should be in like position. His Honour thought it proper to make an order for the caveator's costs as between solicitor and client to be taxed by the registrar and paid out of the estate. The effect of that order would be to make the residue primarily liable, but His Honour did not think that he should make an order which would have the effect of fully indemnifying Mrs. Nortman's share from all liability for costs should it eventuate that the residue of the estate was not sufficient to pay costs. His Honour proceeded to consider the claim that the executor should be personally charged with costs except so far as the residue was sufficient to reimburse him. The matter had to be approached from the point of view whether there was anything in the conduct of the executor which justified the punishing of the executor. He was not in any respect interested as a beneficiary under the will or codicil. He had some doubts, and His Honour believed perfectly honest doubts, as to the validity of the codicil, and he took what he believed to be the proper course to put those claiming under the codicil to proof of its validity. It was suggested that he could have made enquiries from the attesting witnesses, and it was highly probable that he did make such enquiry, because he interviewed the doctor who attested the codicil, for the purpose of obtaining his affidavit as to death. But the executor showed that there were certain circumstances which to his mind and with the peculiar knowledge which he, as the testator's solicitor, possessed, might have justified further enquiry upon the question of undue influence. His Honour thought it established that the executor had honest and reasonable doubts as to the validity of the codicil, and the course he took was not unreasonable. His Honour referred to **Williams on Executors,** 11th Edn., 1651. It was true that in **Wilkinson v. Corfield** (*cit. sup.*) the executor was condemned in costs, but the case was one where the executor had set up a false defence—a clear case of misconduct on his part. His Honour accordingly made an order that costs of both caveator and executor as taxed by the Registrar be paid out of the estate, the residue of the estate to be primarily liable for such costs.

Solicitors for executor: **A. K. Turner,** Auckland, agent for **Connell and Trimmer,** Whangarei.
Solicitors for caveator: **Peek, Kirker and Newcomb,** Auckland, agents for **Rishworth and Harrison,** Whangarei.

Smith, J. August 13, 30; September 28, 1929.
Wellington.

OFFICIAL ASSIGNEE v. FOOTE.

Bankruptcy—Voluntary Settlement—Property Purchased in Husband's Name—Deposit Paid Out of Monies Advanced by Wife's Mother—Balance Paid Chiefly Out of Husband's Earnings—Moneys Derived from Letting of Rooms Not Produce of Wife's Labour—Wife Disbursing Husband's Moneys as His Agent—Transfer of Property by Husband to Wife Before Tendering for Building Contracts on His Own Account—Husband Unable at Date of Transfer to Pay Debts without Recourse to Property Comprised in Transfer—Transfer Void as a Voluntary Settlement—Bankruptcy Act, 1908, S. 75.

Action by the Official Assignee of A. W. Foote (a bankrupt), to set aside a transfer of land from the bankrupt, a building contractor, to his wife, the defendant, Eva Maude Foote, upon the ground that the transfer was a voluntary transfer or settle-

ment, that at the time of the transfer the husband was unable to pay his debts without the aid of the property comprised in the transfer, and that the transfer was, therefore, void pursuant to either Section 75 of the Bankruptcy Act, 1908, or to the Statute of 13 Eliz. c. 5. The defendant and her husband who in March, 1921, were living at Karori with the defendant's father and mother, decided in that year to purchase a house at Petone. The house was purchased pursuant to an agreement for sale and purchase between the vendor and the defendant's husband as purchaser, the price being £520 payable as follows: (a) £50 by way of deposit; (b) a further sum of £170 by equal monthly instalments of £2 7s; (c) a balance of £300 payable with interest on 19th January, 1926. The reason given for placing the property in the name of the defendant's husband was that owing to the defendant having three young children it was inconvenient for her to attend at the offices of the solicitors; the defendant, however, had gone to Petone to select the property purchased. To effect the purchase the defendant arranged to get the deposit of £50 from her mother. It was part of this arrangement that her father and mother should live with the defendant and her husband at Petone on the terms that they should have two rooms at a rental of 10s. per week and that the £50 should be lived out. The defendant obtained the deposit from her mother and handed it to her husband who paid it over to the vendor's solicitors. The redemption of the £50 was recorded in a small notebook kept by the defendant and her mother, headed: "E. Foote with thanks 1921, £50 to pay back." The £50 was lived out at the rate of 10s. per week, and the payments under the agreement for sale and purchase were duly made to the vendor's solicitors, at the rate of £2 7s. per month. In addition, the sum of £4 10s. was payable every three months by way of interest on the balance of purchase money, namely, £300. Those payments were recorded in a book of account headed "Agreement for Sale and Purchase—A. W. Foote, Petone, with Mrs. M. C. Lidderdale. The evidence showed that the husband's earnings averaged £5 per week and that it was obvious at the time the agreement was made that the outgoings would have to be paid by him. The husband supplied the money to his wife who disbursed it, and the whole of the balance payable under the agreement, with the exceptions following, were paid in this way out of the husband's earnings. In 1922 the defendant's husband was out of work for some time and she then went to the soap works and worked there for three months to earn some money to pay instalments and interest due under the agreement for sale and purchase. In 1924, the husband was ill with pneumonic influenza for about 8 weeks, and was out of work, and his wife then raised some money on her life insurance policy for the purpose of keeping the home going. On the 1st October, 1925, the property was re-financed. A first mortgage of £450 was raised, and a transfer was taken in the name of the defendant's husband, pursuant to the agreement for sale and purchase. The husband stated that he understood that it would cost more then to get a transfer to the wife than it would later on. Between October, 1925, and June, 1927, the husband did small jobs in his spare time, although these jobs seemed to have increased progressively in value. The books of account showed a progressive tendency on the part of the defendant's husband, to take bigger risks. Finally, early in 1927, the defendant's husband proposed to start contracting on his own account. His wife's view was that if he was going to start contracting, she wanted the property in her name, or, as she also expressed it, before he started taking any risks, he should put the property in her name. The husband stated that his wife was always getting on to him to transfer the place back to her at once, and that before he went out on his own to work, she wanted the property back in her name. These discussions took place in May, 1927, and prior thereto. The property was transferred by way of gift on 27th May, 1927, the wife paying the gift duty. At that date it was proved that defendant's husband was clearly unable to pay all his debts without the aid of the house property.

Shorland for plaintiff.

C. A. L. Treadwell for defendant.

SMITH, J., said that the plaintiff alleged that the memorandum of transfer from the defendant's husband to her was a voluntary transfer or settlement, and that the husband was unable at the time he made the transfer, to pay his debts without the aid of the property comprised in the transfer. The plaintiff claimed that the transfer was void pursuant either to Section 75 of the Bankruptcy Act, 1908, or to the Statute of 13 Elizabeth c. 5. The defendant's answer was in substance that the property was purchased and paid for by her alone, and that her husband was registered as the proprietor only for the purposes of convenience. In His Honour's opinion, the defendant had failed to discharge the onus of proving that the property was bought with her money. His Honour was not satisfied that the £50 was lent only to the defendant by her mother. Although the note-book recording the "living out" payments was headed "E. Foote, with thanks, £50 to pay back," it was contemplated that the father and mother would live with the defendant and her husband, as they had all done at Karori, and the facts were that the husband paid over the deposit of £50 and executed the agreement for sale and purchase personally. If it had been a special consideration at the time that the property was to belong to the daughter, His Honour thought she would have found it possible to execute the agreement. The inconvenience of arranging to leave young children would not have prevented her from doing so any more than it prevented her from going with her husband to select the property itself at Petone. Moreover, while the £50 was being repaid, by being "lived out," it was the husband who provided the means of preserving the house, by providing the moneys for paying the instalments and interest on the property, with the exception of the occasion when he was out of work, and the other occasion when he was ill. The mere letting of rooms did not, in His Honour's opinion, of itself and apart from the ownership of the house, make the rent thereof the produce of the wife's own labour. It was in a different category altogether from profits derived from the keeping of boarders, which in **Official Assignee of McWilliam,** (1923) N.Z.L.R. 561, was held to constitute the produce of the wife's own labour, It seemed clear, that during the four years 1921-1925 the monthly instalments and the quarterly interest payments were paid directly out of the husband's earnings, and that they did not go through the wife's Post Office Savings Bank account. That view was confirmed by the husband's statement that only what was left after paying groceries, interest, etc., was paid into the wife's bank account. His Honour found, then, that the wife received the husband's wages, and disbursed them as his agent. He made no gift of each payment of wages to his wife so that it became her absolute property. A test might be made on the purely supposititious basis that if the husband had been the defendant in proceedings under the Destitute Persons Act for maintenance orders in favour of his wife and children, he would have been able to show that he had made payments for the maintenance not only of his wife, but also of his children. It followed that the present was not a case in which the moneys invested in the property were the property of the wife either because they were savings of hers, or because they were the produce of her own labour. The only exceptions were the moneys contributed by the wife out of what she earned while the husband was out of work, and out of what she raised on her life policy while the husband was ill. They were quite unsubstantial compared with the total amounts paid on the property. The conclusion to which His Honour came on the evidence was that the property was placed in the husband's name because it was regarded both by the husband and by the wife as his, and that he was paying for it, although the wife managed the disbursement of his wages, and herself contributed something when her husband was out of work or ill. That conclusion was reinforced by the following further considerations: (1) In October, 1925, title was taken in the husband's name. That was at the very time that the husband started to do small jobs in his spare time. Although the surplus, after payment of the groceries, interest, etc., went into the wife's Savings Bank account, the evidence of the husband appeared to show that the husband did not part with the property in the moneys paid into the wife's bank account. It displaced the presumption of the wife's ownership created by Section 11 of the Married Women's Property Act, 1908. The reasonable conclusion appeared to be that he was entitled both to the land and to the money, and that his wife was his manager. (2) The husband stated that his wife was always getting on to him to transfer the place back to her at once. If the present claim of the defendant and her husband represented the true position (namely, that the husband was always but a bare trustee for the wife), and if the wife requested the transfer before title was taken in October, 1925, as the husband definitely indicated, then the husband deliberately took title, not only in defiance of his wife's wishes, but contrary to his legal and moral duty. Having seen the parties, His Honour did not believe that he so defied his wife. If the wife did not request the transfer to her until after it had been transferred to her husband, then the reasonable conclusion was that she wanted it transferred to her to prevent it from being available to her husband's creditors should he fail in his ventures. The fact was that if the wife commenced to ask her husband to transfer the property to her after October, 1925, at which time he began his extra jobs, then the husband resisted the request, and did not execute the transfer until, (a) he was proceeding to take contracts double the size of any of those for which he had previously tendered, and (b) until he was unable to pay his debts independently of the property transferred. The conclusion to which His Honour came was

that both the husband and the wife really regarded the property as the husband's because he was paying for it, but that they thought it was a prudent thing to transfer it to the wife when her husband started to engage in the hazardous business of a building contractor on his own account. It was idle to say that the costs of transfer prevented transfer at an earlier date. (3) The actual transfer of 27th May, 1927, was by way of gift, and was liable to conveyance duty (Stamp Duties Act, 1923, S. 79) whereas if the property had been conveyed pursuant to the trust alleged, the document would have been exempt from conveyance duty: Section 81 (d). Weight must be given to that circumstance. The foregoing discussion of the facts showed that the present case was not within the line of authority exemplified by **Taylor v. Allen,** 19 N.Z.L.R. 85, and **Official Assignee of McWilliam v. McWilliam,** (1923) N.Z.L.R. 561. In the view which His Honour took the case was within the authority of **In re McGrath,** 17 N.Z.L.R. 646, though His Honour regarded it as clearer in the present than in that case that the moneys received by the wife from her husband were received by her as the agent of her husband. She returned them to him, or paid them herself on his behalf as required, to pay principal and interest moneys on a property in his name. It was clear that the transfer of the property from the husband to the wife on 27th May, 1927, was a settlement of property within the definition of "settlement" in the Bankruptcy Act, 1908, and that it was not made before and in consideration of marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration. Nor was it a settlement made on or for the wife or children of the settlor of property which accrued to the settlor after marriage in right of his wife. It was clear also that the settlor was at the time of the settlement unable to pay his debts without the aid of the property comprised in the settlement. He had become bankrupt within three years of the settlement. All the conditions of Section 75 (b) of the Bankruptcy Act, 1908, had, therefore, been fulfilled, and the settlement was void as against the Official Assignee.

It was not necessary to deal with the claim under the Statute of 13 Elizabeth c. 5. His Honour accordingly made an order declaring the transfer void as against the Official Assignee.

Solicitors for plaintiff: **Hogg and Stewart,** Wellington.
Solicitors for defendant: **Treadwell and Sons,** Wellington.

Smith, J. August 2; September 13, 1929.
Palmerston North.

BLACK v. MacFARLANE.

Negligence—Motor-vehicle—Collision Between Two Motor Cars—Street Intersection—"Off Side" Rule—"Off Side" Rule Applying to Intersections in Country Roads—Breach of Rule Conferring No Civil Right of Action on Party Aggrieved—Breach of Rule Evidence of Negligence if Wilful or Negligent, and Contributing to Accident and Accident One Which Regulation Designed to Prevent Duties of Drivers of Vehicles Approaching Intersection—Main Road Driver Travelling at Excessive Speed and Failing to Observe Off-side Rule—Driver on Side Road Failing to Slow up Sufficiently When Approaching Intersection—Accident Due to Negligence of Both Drivers—Son Entitled to Recover Notwithstanding Negligent Driving of Father—Son Not Identified with Father's Negligence—Quaere as to Case of Child of Tender Years—Claim Against Wife and Husband—Wife Owner of Motor-car—Husband and Wife Not Sued Jointly—Judgment Against Separate Estate of Wife—Quaere Whether Plaintiff Entitled to Judgment Against Husband Separately.

Action by plaintiff, aged 18 years, by his father as guardian *ad litem*, claiming damages for injury caused to his eye as the result of a collision between a motor car in which the plaintiff was riding and a motor car in which the defendants were riding. It was alleged that the collision was caused by the negligence of the defendants' driver. The defendant, Elizabeth MacFarlane, was sued as the owner of the car, and the defendant, John MacFarlane, as her husband. The facts were that on 1st April, 1929, the plaintiff was a passenger in a motor car driven by his father along a side road leading from Rongotea to the sea. This road crossed the main road from Foxton to Sanson. The surface of the road at the intersection was of loose gravel and metal. The plaintiff's car approached the intersection about a quarter past noon. Until within 75 yards of the intersection, the car was travelling at about 30 miles per hour, but the plaintiff's driver gradually applied the brakes, and at the time he emerged on to the intersection he was travelling at about 20 miles per hour. When plaintiff's driver was 30 yards from the intersection, he saw no car on the Main Road. At a point 30 yards from the intersection a driver coming from Rongotea had a view of the main road to his left for a distance of about 30 yards from the intersection, but his view of the main road to the right was obscured by a sand cutting and trees until he was clear of the intersection. The main road driver had at a point 30 yards back from the intersection, towards Foxton, a view of the Rongotea road to the right for about 30 yards from the intersection. When the plaintiff's driver was almost on the intersection he saw the defendant's car about 30 yards away coming along the main road from Foxton. It was at this point the driver of the defendants' car, defendants' son, first saw plaintiff's car, the reason for his not seeing the plaintiff's car earlier being that he could not see through the trees. The defendants' car was travelling at this stage at a speed of more than 40 miles per hour. The plaintiff's driver, realising that he could not stop, released his brakes and allowed his car to travel forward across the road in the hope of clearing the defendants' car. He travelled about 27 feet before he was struck by the other car. The driver of the defendants' car applied his brakes, and steered out to his right, in the hope of passing behind the other car. His speed was, however, too great. About 4 or 5 yards before the impact, the defendants' car skidded on the loose metal. It then struck the defendants' car almost at right angles, and carried it sideways for some 49 feet.

F. H. Cooke for plaintiff.

Johnston for defendants.

SMITH, J., said that the plaintiff contended that the collision was caused by the negligence of the defendants' driver in—(1) not keeping a proper look-out; (2) driving at an excessive speed, and (3) failing to observe the "off-side rule," i.e., to give way to traffic approaching from the right. The defendants denied the allegation of negligence and contended that the collision was due:—(1) to the excessive speed of the car in which the plaintiff was riding, and (2) to the failure of the driver of the plaintiff's car to keep a proper look-out, to give warning of his approach, and to observe the rules of the road. The defendants further contended that, if they were guilty of negligence, then the negligence of the driver of the car in which the plaintiff was travelling amounted to contributory negligence for which the plaintiff was responsible.. His Honour found that no warning was given by either driver. As to keeping a proper look-out, the plaintiff's driver said he looked both to the left and the right, but that he knew of the "right-hand" or "off-side" rule of the road, and that also as the right-hand side of the intersection was the harder (in that there was a less field of vision on that side), the right-hand side was the one on which his attention was the more fixed. In His Honour's opinion, neither driver saw the other as soon as he might have done.

The plaintiff's driver justified his concentration of view to the right, and such speed as he was driving at, on entering the intersection, by reference to the off-side rule. Plaintiff's counsel also contended that defendants' driver, although on a main road, was guilty of a breach of the off-side rule, and, as such, clearly negligent. The rule in question was No. 13 of Regulation 11 made under the Motor-vehicles Act, 1924, which provided as follows: "Every driver of a motor-vehicle when approaching any intersection the traffic at which is not for the time being controlled by a police officer or traffic inspector, and to which any other vehicle (inclusive of trams) is approaching, so that if both continued on their course there would be a possibility of collision, shall, if such vehicles (being other than a tram) is approaching from his right, or if such vehicle (being a tram) is approaching from any direction, give way to such other vehicle, and allow the same to pass before him, and, if necessary for that purpose, stop his vehicle, and no driver of a motor-vehicle shall increase the speed of his vehicle when approaching any intersection under the circumstances set out in this clause." The regulations, of which this was one, were made by Order-in-Council under statutory authority to make regulations regulating motor traffic on roads and streets and public places. They appeared to apply to the whole of New Zealand, and regulations made by any local authority relating to motor-vehicles and motor-vehicular traffic were subject to the regulations made under the Act. It was clear then, that the regulation in question applied to all roads and streets, whether main or side, and whether in city, town, or country. It was a statutory traffic regulation. It was clear, His Honour

thought, that a breach of it could give no right of action to the person aggrieved, by virtue merely of the breach. The effect of the regulation depended upon the intention of the Statute: **Phillips v. Britannia Hygienic Laundry Co.,** (1923) 1 K.B. 539, (1923) 2 K.B. 832. In the present case, there was only one penalty provided for numerous acts of differing weight and importance, namely a penalty not exceeding £50. The duty which was imposed was, His Honour thought, a public duty only. The regulation conferred no rights on a special class of the public. It was made in the interests of motorists and pedestrians alike; Furthermore, it was clear that in civil actions based on negligence, the failure to observe the rule of the road might be justified by circumstances, although no such exemption was provided by the terms of the regulation itself. His Honour thought, then, that the regulation did not confer upon a party aggrieved a civil right of action by virtue merely of a breach thereof. The remedy for the breach was a police remedy, viz., the penalty provided by the regulations. It did not follow, however, that the breach of a traffic regulation might not be used as evidence of negligence in a civil action. The conditions upon which such a breach was evidence of contributory negligence were explained by Salmond, J., in **Canning v. The King,** (1923) G.L.R. 595. They were: (1) The breach must be a wilful or negligent breach, and not the outcome of inevitable mistake, accident, necessity or other justifying circumstances; (2) The breach must have been the cause or contributory to the cause of the accident; (3) The purpose of the statute must have been to prevent the kind of accident which actually happened. His Honour respectfully relied upon that view, and added that if those were the conditions of the use of a breach of a traffic regulation as evidence of contributory negligence, they were also the conditions of the use of such a breach as evidence of negligence. The plaintiff took the onus of proving the regulation, and of the fulfilment of the condition, and when he had done that he had established a *prima facie* case of negligence. In that sense individual rights and remedies were affected by the statutory regulation. But notwithstanding the establishment of a *prima* facie case of negligence in such a way, it was still open to the defendant to show any circumstances justifying a disregard of the regulation—**Phillips v. Britannia Hygienic Laundry Co.** (*cit. sup.*)—or that the breach of the regulation did not in fact cause the collision. The defendant might also rely on any other defence open to him in an action for negligence, such as contributory negligence or *volenti non fit injuria.*

It was necessary to consider the legal incidence of the "off-side" rule, in certain respects. An "intersection" was defined in the regulations as meaning "the crossing of a road by any other road or by any railway or tramway, at a level crossing; and included the "meeting of a road with any other road." The rule applied, then, both to intersecting roads and to roads which merely met. Prior to the making of the regulation, the law was plain that a driver emerging from a side road to join the main road traffic must either stop or proceed slowly so as to turn into the main road on his correct side, and keep a sharp look-out so as to be ready to stop or to turn to the right or to the left in time to avoid a collision: **Wiri Kingi v. Guy,** (1921) N.Z.L.R. 331; **Boon v. Love,** (1926) G.L.R. 38. Similarly, it was clear that before the making of the regulation, a driver crossing a main road from a side road must have been prepared to stop before crossing so that an uninterrupted right of passage might be left for any traffic on the main highway with which the side road driver was likely to come into collision. That did not relieve the main road driver from the duty to take care and to observe his points of danger: **Simpson v. Watson,** (1928) G.L.R. 501. The law of New Zealand might indeed be stated, His Honour thought, as it was stated by the Court of Session in **Hutchison v. Leslie,** (1927) S.C. 95. It was to be observed, however, that the distinction between a "main road" and a "side road" was by no means one of automatic clarity. In **M'Nair v. Glasgow Corporation,** (1923) S.C. 397, 404, Lord President Clyde pointed out that "the distinction between a 'main road' and a 'side road' is itself a question of circumstances so variable and uncertain in character as to be unreliable and impracticable in a vast number of instances." But where the distinction existed, then, if the off-side rule was applied, it was clear that main road traffic must give way to side road traffic approaching from the right and with which there was a possibility of collision; and, if necessary for that purpose, must stop. His Honour saw no escape from that construction. It appeared to be clearly intended to lay down a definite rule. But difficulty arose in its application. Main road traffic was entitled to proceed at a good speed. Bitumen and concrete highways were intended to carry fast-moving traffic. Yet, where the intersection was reasonably visible to a driver on a main road or where he should reasonably know of its existence, it was, His Honour thought, his duty to take steps to observe the rule, should a possibility of collision arise. That might mean a reduction in speed and a sounding of the horn. Where the intersection was not so visible, or where the driver was reasonably unaware of its existence, he was not reasonably in a position to take steps to observe the rule. Then, whatever might be the driver's position in a Police Court, he had not committed a wilful or negligent breach of the rule, and a breach of it could not be used as *prima facie* evidence of negligence against him: **Canning v. The King** (*cit. sup.*). The test of wilful or negligent breach of the rule must depend then on the circumstances of each case. Where the view of an intersection was clear, and drivers knew there was or was likely to be traffic, the driver approaching from a side road on the right of a driver on the main road might be entitled to assume that the main road driver would give way. In that sense, the words of *Lord Atkinson in* **Toronto Railway Company v. King,** (1908) A.C. 260, 269, which His Honour quoted and which applied to city streets, might be applicable in varying degree to less populous thoroughfares. But below the circumstances of clear visibility and knowledge of traffic, there were circumstances of infinite variety. It must, therefore, be determined on the circumstances of each case whether the defendant was guilty of a wilful or negligent breach of the off-side rule. If he was not so guilty, then a breach of that rule, if it did occur, could not be relied upon as *prima facie* evidence of negligence; and the rights of the parties must be determined solely upon the ordinary principles of liability for negligence.

The defendants' driver knew that he was approaching an intersection. He knew that the surface was of loose gravel and metal. He knew of the off-side rule. He said himself that it was his duty to slow down to 15 miles per hour and to give way to any other car coming out from the intersecting road. His excuse was that he did not see the other car in time. In His Honour's opinion, that was an insufficient excuse. His knowledge of the intersection and its nature was such as to make it incumbent on him to have slowed up to enable him to apply the rule, should occasion arise. He clearly failed to slow up sufficiently. He was, in His Honour's view, guilty of a negligent breach of the off-side rule. The second condition upon which a breach of the off-side rule as *prima facie* evidence of negligence depended was whether the breach was the cause or a contributing cause of the collision. There was no doubt that it was so in the present case. The third condition upon which a breach of the off-side rule as *prima facie* evidence of negligence depended was whether the purpose of the statutory rule was to prevent the occurrence of the kind of collision that actually occurred. In His Honour's opinion, there could be no doubt that that was its very purpose. It purported to vary the obligations imposed upon main road and side road drivers as established by **Wiri Kingi v. Guy** (*cit. sup.*) and **Boon v. Love** (*cit. sup.*). It operated when there was a possibility of collision. It seemed to His Honour that the prevention of collision by the adoption of a uniform traffic rule was the whole object of the regulation. The plaintiff, then, had proved the traffic regulation, and the fulfilment of the aforesaid conditions. It followed that the breach of the regulation by the main road driver (defendants' driver) was *prima facie* evidence of negligence on his part. In addition to that *prima facie* evidence, and apart from the regulation, His Honour thought it clear that if the driver of a motor-car, notwithstanding that he was on a main road, proceeded to pass a true intersection, the surface of which was comprised of loose gravel and metal, and the view of which was obscured to one side, at a speed of some 42 miles per hour, he was guilty of negligent driving at Common Law.

It was necessary now to consider the position of the plaintiff's driver. In His Honour's opinion, the plaintiff's driver had failed to "slow up" sufficiently. He was the side road driver. If a car had been coming down the main road on his right, on which side his field of vision was less than on his left, he could not possibly have stopped to allow the car on his right to pass before him. It was true that that occasion did not arise. The actual danger came from the left. But if the plaintiff's driver had slowed up sufficiently to allow traffic from his more dangerous right to pass him, he could also, and more easily, have avoided traffic from his less dangerous left. His Honour did not think that the effect of compliance with his duty to his right (which would have resulted in this case in his ability to stop almost dead) could be properly separated from his duty to act reasonably when danger appeared to his left. His failure in that respect appeared to His Honour to constitute negligence contributing to the cause of the collision. Apart, however, from that failure of plaintiff's driver, His Honour did not think that as a side road driver he had any right to assume that the off-side rule would necessarily be observed by a main road driver passing along that particular main highway through the country. That was not, it appeared to His Honour, a reasonable assump-

tion to make. Until the off-side rule was more emphatically established by custom and usage on country roads, His Honour did not think that the same assumption could be made as a driver on a city street might make. A side road driver on a country road must act reasonably, and from the point of view of his civil liability, "slow up" so as to be able to avoid traffic to his right or to his left. He had the advantage, however, that if a collision occurred, notwithstanding his care, a main road driver approaching from the side road driver's left would be guilty, *prima facie*, of negligence, if he had wilfully or negligently failed to observe the off-side rule, and such failure had been the cause or a contributing case of the collision. In His Honour's opinion, plaintiff's driver was guilty of negligence in failing to slow up sufficiently to avoid danger either to his right or to his left when debouching on to the dangerous intersection.

His Honour found then, that both drivers were guilty of negligence contributing to the collision. The collision must have occurred in less than two seconds after the cars sighted each other. Upon a careful consideration of the evidence, His Honour was unable to say that there was a sufficient separation of time place or circumstance between the negligent management of the defendants' car and that of the plaintiff to make it right to treat the negligence of either as the sole cause of the collision: **The Volute,** (1922) 1 A.C. 144; **O'Callaghan v. Hawke,** (1926) G.L.R. 478. The collision was due to the negligence of each driver, mainly in driving on to the intersection at an excessive speed, and to some extent in failing, at the intersection, to sound the horn, and to keep a proper look-out; and neither driver (nor any owner responsible for the driver) could recover from the other.

The next question was the right of the plaintiff to recover from the defendants. The plaintiff was not the driver of the car in which he was, nor the owner of it. He was a passenger, but not for hire. He was of a family party proceeding to the seaside. The question was whether plaintiff was responsible for the negligence of his father who was his driver. It was clear that if he were a passenger for hire, he would not be debarred from recovering against the defendants by the contributory negligence of his father, apart of course, from any power of control otherwise arising: **The Bernina,** 13 A.C. 1, overruling **Thorogood v. Bryan,** 8 C.B. 115. In such a case, it was now clear that a plaintiff by selecting his particular conveyance did not so far identify himself with the defendant and his servants, that if any injury resulted from their negligence, the plaintiff must be considered a party to it. Did a different rule apply where there is a family relationship? His Honour did not think so, except possibly in the case of a child of tender years who was in the care of an elder guardian: **Waite v. North Eastern Railway Co.,** E.B. & E. 728. His Honour referred to the comment on this case in **Salmond on Torts,** 7th Edn., 54, and **Beven on Negligence,** 4th Edn., 226, and said that whatever was the true explanation of **Waite's case,** His Honour was of opinion that it had no application to the facts of the present case. The child there was five years old, and was described by Cockburn, C.J., as a child of "tender and imbecile age" and "wholly unable to take care of itself"; and as having "no natural capacity to judge of the surrounding circumstances." That could not be said of a young man of 18, for whose maintenance his father was no longer responsible, and who was earning his own living. Mere family relationship as such did not identify any member of the family with the negligence of any other member of it. Where a collision was caused by the negligence of two drivers the wife of driver A was not so identified with A as to be precluded from recovering damages from driver B: **Bruce v. Murray,** (1926) Sc. L.T. 236, cited in **Roberts and Gibb on Collisions on Land,** 2nd Edn., 25. Nor, in similar circumstances, was a mother identified with the negligence of her son: **Terry v. Gould,** 69 Sol. J. 212. If, however, the wife or mother were the owner of the car so driven by her husband or son, she would be responsible on the grounds of agency and control: see **Roberts and Gibb on Collisions on Land,** 2nd Edn., 24. If a wife, though a passenger, were not identified with her husband, when she neither owned nor controlled the car which he was driving, then neither was an able-bodied son, similarly a passenger, identified with the negligence of his father when the son neither owned nor controlled the car which the father was driving. In the present case, the car was the father's, and His Honour found on the facts that the son neither owned it nor controlled it on the occasion in question.

The defendants' driver and plaintiff's driver were not joint wrong-doers. They were each independently negligent: **Thompson v. London County Council,** (1899) 1 Q.B. 840. The defendant, Elizabeth MacFarlane, being responsible for her son's negligence, was liable for the damage done to persons not identified with her son's negligence, and not debarred by contributory negligence from claiming against her. The same principle of liability applied, of course, to the plaintiff's father as a negligent owner and driver. The plaintiff was one of those who were not debarred from claiming against the defendant Elizabeth MacFarlane. His Honour awarded the plaintiff £71 5s. 6d. special damages and £400 general damages, and judgment was given for the plaintiff accordingly. The plaintiff could not, His Honour thought, have judgment against the husband separately, and he had not sued husband and wife jointly at Common Law, adding a claim under the Married Women's Property Act. Judgment might be entered against the separate estate of the defendant Elizabeth MacFarlane, but liberty was reserved to counsel for the plaintiff to show cause why judgment should be entered against the husband as well as the wife. The final judgment might be settled in Chambers, if necessary.

Solicitor for plaintiff: **F. H. Cooke,** Palmerston North.
Solicitors for defendants: **Park and Adams,** Levin.

Kennedy, J. August 21; September 16, 1929. Invercargill.

EDGINTON AND BERNSTONE v. WAIHOPAI RIVER BOARD AND SOUTHLAND COUNTY.

Rating—River Board—Injunction—Laches—Invalid Rate—Injunction to Restrain Rating Authorities From Proceeding with Summonses Issued to Recover Rates—Right to Injunction Notwithstanding Statutory Provision That Invalidity of Rate Not to Prevent Recovery Thereof—Failure to Take Proceedings for Three Months After Knowledge of Invalidity of Rate Not Constituting Acquiescence—No Laches—Rating Authorities Not Induced to Alter Position by Conduct of Plaintiffs—Fact that Large Proportion of Rates Collected No Ground for Refusal of Injunction—Rating Act, 1925, Sections 4, 66—River Boards Act, 1908, Sections 87, 101.

Claim by plaintiffs for a declaration that certain rates made and levied by the defendants on land in the Waihopai River District were invalid and for an injunction to restrain the defendants from proceeding with summonses issued to recover such rates. The Waihopai River Board was a river board duly constituted under the River Boards Act, 1908, and the whole of the land in the river district of such Board was situated in the Southland County and the Borough of Invercargill. The system of rating on the unimproved value was in force in both the Southland County and the Borough of Invercargill and accordingly the rates made and levied in the Waihopai River District were by Section 4 (3) of the Rating Act, 1925, to be made and levied according to that system. The Waihopai River Board by special order dated 14th December, 1927, directed that a general rate be made and levied within the whole district of the Board by the Southland County Council and caused a copy of such special order to be forwarded to the Southland County Council, and not to the Invercargill Borough Council. On 13th January, 1928, the Southland County Council, by the direction of the Waihopai River Board, made and levied general River Board rates, not on the system of rating on the unimproved value, but on the system of rating on the capital value of land, and made and levied such rates not only upon land situated within the Southland County but also upon land situated within the Borough of Invercargill. The total amount of the Waihopai River Board rates for the year 1927-28 was £582 8s. 10d., and of that amount the sum of £437 13s. 7d. had been received from the Southland County Council. Of 287 ratepayers, 213 had paid the rates demanded from them, while £135 0s. 4d. was outstanding. The demands for the rates were sent out in March, 1928, and proceedings to recover the rates were taken in May, 1929. No proceedings had been taken in respect of the rates for the year 1928-29. The rates for that year amounted to £582 10s. 7d., of which £322 8s. 7d. had been collected. Of 291 ratepayers 163 had paid, leaving £206 10s. 7d. unpaid by 128 ratepayers. When the defendants issued summonses for the recovery of the rates in May, 1929, it was arranged that the summonses should be adjourned until after these present proceedings had been brought and determined.

W. A. Stout and **Hall-Jones** for plaintiffs.
S. M. Macalister and **Gilfedder** for defendants.

KENNEDY, J., after referring to Sections 87 and 101 of the River Boards Act, 1908, said that it was clear that the rates

made and levied were invalidly made because they were made and levied on the system of rating on the capital value when, according to law, they should have been made and levied on the system of rating on the unimproved value. It was equally clear that the Southland County Council had no statutory authority to make and levy rates upon land not situated within the Southland County, but situated within the Borough of Invercargill. It followed then that the general river board rates for the year 1927-28, which the Southland County Council purported to make, levy and collect were not according to law and were invalid. His Honour referred to Section 66 of the Rating Act, 1925, and said that notwithstanding the terms of that section it had been held that a ratepayer had still a right to apply to the Court to restrain a local body from collecting an invalid rate. His Honour referred to **Hendry v. Hutt County Council,** 3 N.Z.L.R., C.A. 254, which was recently followed in **Broad v. County of Tauranga,** (1928) N.Z.L.R. 702. His Honour saw no reason in principle why a defendant which had issued a summons and taken certain steps towards the collection of an invalid rate, should not likewise be restrained although it had proceeded further in its endeavour to enforce payment of its invalid rate than had the Tauranga County Council in the latter case. The defendants then must be restrained from further proceeding to collect the invalid rate unless, as contended on behalf of the defendants, the plaintiffs' conduct had disentitled them to this remedy.

The defendants contended that the plaintiffs had been guilty of laches and that an injunction should, for that reason, be refused, that the ratepayers had the most ample notice by advertisement of the rate and that the plaintiffs should have applied promptly, after such notification was given, to the Court to restrain the defendants from making, levying and collecting the rate. In the meantime, it was said, other ratepayers had paid and it would be a hardship upon them and upon the defendants, if the defendants were not allowed to proceed to collect from the plaintiffs and others who had not yet paid. It was urged that to grant the injunction would result in the Board having to collect in four years, if the Board were restrained, an amount which it could collect in two years if it were permitted to proceed with the summonses against defaulting ratepayers. This was urged as an element which the Court should take into consideration in granting or refusing an injunction. A plaintiff seeking equity was bound to prosecute his claim without delay, for a Court of equity refused its aid to a stale demand where a party had slept upon his rights and acquiesced for a great length of time. The plaintiffs' claim was then said to be barred by his laches. Delay in itself might be so great as to constitute laches and render the complaint stale so that a court of equity would not enforce it. In the absence of special circumstances a delay of over twenty years was the period which in practice might be taken as barring a claim; but delay for any shorter period might, having regard to such circumstances as were properly to be considered by a court of equity, bar the claim. In determining whether there had been such delay as to amount to laches the Court would consider any acquiescence on the plaintiff's part and any change of position which had taken place on the defendant's part. Acquiescence meant assent after the plaintiff had become aware of the violation of his rights. A person could not be said to have acquiesced in the claim of others unless he was fully cognisant of his right to dispute them: **Marker v. Marker,** 9 Hare 1, 16. The party acquiescing must be aware not only of the facts upon which his claim to relief was based, but his right to redress in respect to them. His Honour referred to **Randall v. Errington,** 10 Ves. 423, per Grant, M.R., at p. 426. The onus of proving acquiescence lay upon the defendants who asserted it. There was no evidence that the plaintiffs, any more than the defendants and other ratepayers, were, notwithstanding the publicity given to the making of the rate, aware prior to February, 1929, that the rate was invalid. His Honour did not think that acquiescence in an invalid rate was to be inferred against ratepayers who declined to pay that rate, merely because they did not, after declining to pay, follow that up by proceedings to have the rate declared invalid in the interval between February, 1929, and May, 1929, or even until they were sued for the rates by the defendants. What concerned ratepayers was not so much the declaration of a rate as its attempted enforcement through the Courts. His Honour did not consider the delay so great, in the circumstances obtaining, that the plaintiffs should be denied their remedy. The plaintiffs had no other remedy readily available than the remedy which they sought, and if an injunction were refused the result would be that the defendant Board might proceed to collect an invalid rate, collecting from certain ratepayers a larger sum than would be payable if a proper system were adopted and collecting a larger amount in one year than could properly be collected if the law were followed. To refuse a remedy to ratepayers, who claimed that the rate was invalid, was in effect to legalise what was illegal and to confer in substance upon the defendants powers in addition to and different from those conferred by statute. The plaintiffs were applying neither for an interlocutory nor a mandatory injunction. The injunction asked for was merely to restrain the defendant from proceeding further to collect a rate they should never have made and levied. No question of the loss or destruction of evidence arose nor could it be suggested that the plaintiffs had abandoned or released their right to object. It could not properly be contended that the plaintiffs had so acted as to induce the defendants to alter their position in the reasonable belief that the plaintiffs had released or abandoned their right to object. The defendants made and levied and proceeded to collect the rate of their own motion and not in reliance upon, or by reason of, anything which the plaintiffs did. Moreover the defendants could not successfully plead that it would be a hardship for the defendant River Board to have to wait a further two years, as it would have to do if restrained from proceeding to collect the invalid rate, to raise sufficient money to pay existing obligations and thereafter to become dissolved. If, following the law, it could only have raised sufficient money in the longer period, it could not be heard to say that it would be a hardship to have to wait a further two years if it was not allowed to pursue a course which was not authorised by the statute. The defendants could not successfully urge that it would be a hardship upon ratepayers who had already paid. It was true that what they had paid might not be recoverable: see **Julian v. Mayor, etc., of Auckland,** (1927) N.Z.L.R. 453, and **Slater v. Mayor of Burnley,** 59 L.T. 636. The payment of rates by the ratepayers who had paid was a voluntary payment and it was none the less a voluntary payment in the eyes of the law because it was made upon a demand by the Southland County Council and possibly under a threat that if payment was not made legal proceedings would be issued. Ratepayers made that payment presumably because of the demand from the Southland County Council and not because they relied or were entitled to rely upon the mere passivity of the plaintiffs. Furthermore there was no evidence that the sums received from the ratepayers who had paid, were received after the date when the plaintiffs first became aware of the invalidity of the rate and that could not be assumed. The defendant Board could not urge that its position, as distinct from the ratepayers who paid it, had become prejudiced through the inactivity of the plaintiffs, when the only result had been that they had received moneys which could not legally be demanded. There was nothing in the conduct of the plaintiffs which would result in the defendants being placed in a position in which it would not be reasonable for the plaintiffs to assert their rights to resist the invalid rate. The Court, if the element of hardship was to be regarded, could not disregard the fact that there was a considerable body of ratepayers besides the plaintiffs who had not paid and who would likewise suffer hardship if an injunction were refused. The incidence of the rates was different if the rates were levied upon the system of rating upon the capital value. In the result, therefore, His Honour held that the defendants had failed to prove laches and that an injunction should issue restraining the defendants from proceeding to collect the invalid rate and in particular from issuing and proceeding with summonses therefor.

Solicitors for plaintiffs: **Rattray and Hall-Jones,** Invercargill.
Solicitors for defendants: **Macalister Bros.,** Invercargill.

Rules and Regulations.

Fisheries Act, 1908: Native Land Amendment and Native Claims Adjustment Act, 1926: Taupo Trout-fishing Regulations, 1929. Rotorua Trout-fishing Regulations, 1929.—Gazette No. 68, 15th October, 1929: Amended regulations for trout, perch and tench fishing in Waitaki Acclimitization District.—Gazette No. 69, 17th October, 1929.

Honey Export Control Act, 1924. New Zealand Honey Control Board Election Regulations, 1925. Amendment No. 1.—Gazette No. 69, 17th October, 1929.

Seeds Importation Act, 1927. Seeds Importation Regulations, 1929, revoking regulations of 28th April, 1928.—Gazette, No. 69, 17th October, 1929.

Professional Discipline.

The Disciplinary Jurisdiction of the Supreme Court of New Zealand over the Legal Profession.

By H.F. VON HAAST, M.A., LL.B.

(*Continued from p. 299*)

What is professional misconduct? It is not necessary that it should be established that the practitioner has been guilty of any breach of the law, criminal or civil. Such conduct must be something more than a gross breach of professional etiquette, that would be reprobated by the reputable members of the profession. The Court of Appeal has held that it is impossible to define—and it would be extremely unwise to attempt to define—what conduct comes within the meaning of serious professional misconduct: *Re Lundon*, 28th October, 1911, reported in note to *In re Baillie*, 34 N.Z.L.R. 705, at pp. 708 and 709.

Two cases decided in 1917 illustrate how incumbent it is upon a solicitor jealously to protect the interests of his clients: *In re Beard*, (1918) N.Z.L.R. 202, and *In re Lundon*, (1918) N.Z.L.R. 193. In the former case it was laid down (p. 211) that where a solicitor's personal interests come into conflict with the duty of protecting the client, and he sacrifices his duty to his personal interests, he is guilty of professional misconduct. That was a case of an old and experienced solicitor buying land from "an easy-going, pliant and complaisant subject" without placing himself at arm's length with his client. Although the client was passed on to another solicitor to advise whether the documents drawn to carry out the bargain—an unconscionable one—were in due form for that purpose and to ascertain whether the client was willing to carry it out, the advising solicitor was not placed by the purchasing solicitor in possession of all the facts so as to be able to advise on the propriety of the bargain itself. Hence then solicitors must realise that the rules devised by the equitable doctrines of the Courts for the protection of clients from solicitors who purchase their property form a standard of honourable conduct on the part of the profession, and that where a solicitor by consciously departing from that standard has profited at the expense of his client, a case for the exercise of the Court's disciplinary powers is made out. In that case suspension for three years was ordered by the Court. In *In re Lundon*, (1918) N.Z.L.R. 193, the solicitor took advantage of a weak and intemperate man to make an unconscionable bargain with him for uplifting moneys on deposit, to get from the client a document alleging that a sum on deposit was a personal loan, as a device to defeat its being available in law for an expected claim against the client, later claiming that it was a loan and refusing to account. In this case, in view of a previous suspension, the practitioner was struck off the rolls.

Another case illustrating the necessity of a solicitor putting his client at arm's length with him, if he is to benefit pecuniarily from the relations between them, is *In re a Solicitor*, (1894) 1 Q.B. 254, in which the solicitor was a man of ripe age and his client a young man of extravagant habits and a good deal under the influence of his professional adviser and from whom he had received an advance during his minority. Shortly after the coming of age of the client the solicitor received from him sums amounting to £69,500 as a loan at 5 per cent. p.a., and eventually was unable to repay considerable portions of the money lent. For thus combining the two inconsistent characters of a borrower gaining a personal advantage from the use of these large sums and that of professional adviser to the young man, the solicitor was suspended for two years.

Considering the test and the view taken in New Zealand and the consequences that must follow if a solicitor places personal advantage before duty, the decision of the Supreme Court of Tasmania in *Southern Law Society v. Westbrook*, 10 C.L.R. 609, was surprising. In that case a solicitor who was entitled to certain benefits under the terms of a will which had been prepared by himself, and the validity of which was impeached, concealed from his clients, who were also interested under the will, the fact that he took any benefit under the will, and the concealment of that and other material facts induced those clients to employ him as their solicitor, to become parties to a probate action to support the will, and to agree to a compromise by which an investigation of the facts upon which the solicitor's right depended was prevented. The Supreme Court of Tasmania merely reprimanded the solicitor and refused to order him even to pay the costs of the application. On appeal the High Court of Australia took an entirely different view. Higgins, J., at p. 627 said: "It is as if a wolf in sheep's clothing persuaded a lamb to put itself under his protection against a wolf whom he pretends to be near. So great is the power which a solicitor has, in affairs of moneys, with his clients that the Courts insist on the utmost good faith on his part towards them and do not tolerate deceit practised by him with a view to his private interest." Isaacs, J., declared: "The discipline extended by the Court looks entirely to the future. How will the administration of justice be affected? How can this practitioner be trusted to make wills for confiding clients often in extremity of body and spirit, and afterwards, when the client is forever silent, assist the Court in determining whether they should be accepted as the true expression of the testator's own mind, or the unfair product of the will of the solicitor and his managing clerk?" The High Court, therefore, allowed the appeal and struck the solicitor off the roll. *Re a Practitioner*, (1918) South Aus. L.R. 160, had some features resembling those of *In re Lundon*. The client, a steward on a steamship, paid his solicitor several sums of money for the purpose of investment; the solicitor, knowing that the client had paid it under that belief, nevertheless received it intending to use it for his own purposes, and did not undeceive the client or explain to him what the solicitor had in his mind. The practitioner claimed that the payments were loans to him. The Supreme Court of South Australia struck the solicitor off the roll, holding that a practitioner may be found guilty of unprofessional conduct on evidence which would neither be sufficient to support a criminal conviction nor to give the injured party a remedy by any action. But apparently this decision was based on the Law Society Act, 1915, in which the proceedings of the Statutory Committee and its enquiry into charges of professional misconduct are "carefully placed upon a footing sharply distinguished from the criminal plane." In *In re Pullen*, 30 N.Z.L.R., 517, a solicitor on behalf of a client wrote a letter to another solicitor making a claim for a large sum of money, a claim which he knew, or ought to have known, had no foundation in fact,

and intimating that in default of a settlement his client would take criminal proceedings. When his conduct in writing the letter was challenged, his explanation was unsatisfactory. He was suspended for twelve months.

There is no case recorded in our reports where a solicitor has been struck off the rolls simply for failure to keep a separate trust account and to pay all trust moneys into it, and retain them there until paid to his clients, as directed by Section 47 of the Law Practitioners Act, 1908, although this failure has been an ingredient in several of the cases brought before the Court in which there has generally been a grosser offence committed by the solicitor. In *In re Bruges*, 26 N.Z.L.R. 541, Denniston, J., said at p. 544: "I am not prepared to say that the deliberate and long-continued breach of a statutory duty imposed upon solicitors with the express purpose of making it impossible with reasonable care for them to lose their clients' moneys, and by which breach their money has been lost, would not in itself be sufficient to make it a duty of the Court to declare that the solicitor so acting was unfit to practise his profession." But the facts in that case went far beyond that and the solicitor was struck off.

In *Purser's case*, decided in 1929, but unreported, the allegations on which he was struck off (by consent) were his failure to pay into a trust account and to retain there until payment out to his clients certain trust moneys, and his giving cheques on his trust account well knowing that there were not funds in such account to meet such cheques.

The Court takes a serious view of any attempt by a solicitor to evade payment of stamp duty. Thus in *Re Iles*, (1922) 66 Sol. J. 297, a solicitor in Trinidad was struck off the rolls by the Supreme Court of that Colony for altering, fifteen years previously, the date of a deed after its execution with the alleged intention of evading the payment of fifteen shillings penalty for stamping the deed out of time. His appeal to the Judicial Committee of the Privy Council was dismissed, the Court reflecting that the fact had become known in spite of the appellant, in circumstances of some notoriety in which any leniency might have grave consequences, and in spite of an ingenious but somewhat audacious attempt to conceal it by discreditable denials. "The appellant might have," said Lord Sumner, "pleaded that he had long forgotten the circumstances, that he had never recalled the act without regret, and that he had atoned for a single fault by years of unblemished professional conduct. Had he done so, no doubt a different complexion would have been put upon the matter; but he staked all on his affidavit and his affidavit was not accepted."

Book-making, in spite of "Sir Edward's" testimonials to the integrity and sportsmanship of "Duggie" on the back of the *Tatler*, is incompatible with continuance on the rolls as a solicitor: *In the matter of a Solicitor*, (1905) 22 T.L.R. 127. There a solicitor who had ceased to practise since 1898 and had not since taken out his certificate was carrying on the business of a bookmaker. The Court held that it was in the highest degree improper for a solicitor on the rolls to carry on this business and struck him off.

The question of the association of a solicitor with a debt-collecting agency has twice recently come before the Court. The Court did not express any opinion as to how far a solicitor may or may not legitimately associate himself with a genuine debt-collecting society and in *In re A Solicitor*, (1912) 1 K.B. 302, at p. 314, Hamilton, J., said: "It is neither necessary nor desirable to define what connection a solicitor may legitimately have with debt-collecting societies, or societies for the mutual protection of their members." In that case and also in *In re a Solicitor*, (1913) 29 T.L.R. 354, a solicitor was party to the formation of a debt-collecting company or association, financed it, and controlled its affairs with a view to its employment by him as an adjunct to his business as a solicitor; by the agency of the company he systematically solicited debt-collecting business without disclosing his connection with the company and with a view to procuring for himself the business of recovering the debts. The terms on which the solicitor conducted proceedings, viz., a commission by way of percentage on the amount recovered only, was champertous. In the former case the solicitor also included on each indorsement on the writ of summons a claim for his costs, although by the terms upon which he conducted the proceedings the plaintiffs were not to pay him any professional charges. In each case it was held that the solicitor had been guilty of professional misconduct. In the former case he swore a false affidavit and was suspended for twelve months and ordered to pay costs. In the latter, the solicitor having as soon as the former case was decided at once severed his connection with the association, he was ordered to pay the costs of the proceedings. In the former case Darling, J., applied to solicitors the definition given in *Allison v. General Council of Medical Education and Registration*, (1894) 1 Q.B. 750, with regard to medical men: "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect,'"—a rather unfortunate analogy, perhaps, seeing that medical men have been excluded from practice for doing what their professional brethren regarded as unprofessional, but what was really in the interests of suffering humanity.

On the border line between professional misconduct and dishonourable conduct *dehors* the profession was the conduct of a solicitor in *In re a Solicitor*, (1911) 27 T.L.R. 535, in which the headnote reads: "The Court has power to punish a solicitor if he has been guilty of dishonourable conduct which makes him unfit to be a member of an honourable profession and an officer of the Court, or which would be sufficient to prevent his admission as a solicitor." There a solicitor in the capacity of legal adviser to a convict, the notorious murderer Crippen, under sentence of death, was permitted to visit the convict in prison. In abuse of the privilege thus extended to him he aided and abetted Horatio Bottomley, the editor of the newspaper *John Bull*, to disseminate in his journal false information in the form of a letter purporting to be written by the convict, although, as the solicitor knew, no such letter in fact existed, and he further published or permitted to be published other false statements relating to the same matter knowing them to be false. He was held to have been guilty of professional misconduct and was suspended for twelve months and ordered to pay costs.

(To be concluded)

London Letter.

Temple, London,
14th August, 1929.

My dear N.Z.,

We have been on the loose now for fifteen days, though as yet the General Public does not realise that we barristers are, as is our custom at this time of the year, stealing a march on them in the matter of holidays. The August Bank Holiday arrived rather late in the month, this year, and in all years it has now become somewhat extended; not much work was being done anywhere up till the day before yesterday, a Monday; and it was not possible to distinguish us from the ordinary run of vacators or to see any expressions or marks upon our faces intimating that we were committed to something like ten weeks of vacation. But I dare say that the best two, of the whole ten, weeks have now gone; the solicitors, bless them all, will soon be getting back to work themselves and disturbing us in our retreats; and I dare say that on the whole they fare better with their set four weeks, as often as not taken in this month of school holidays, than we do with our more prolonged but also more precarious period. Our professional clients tend to divide themselves, somewhat inconsiderately, into two categories: August holiday-makers, who want to finish off their work, with our urgency-will-oblige assistance, before they go, and September holiday-makers, who return full of vitality and an immediate desire to confer or draft.

Some placid degrees of controversy is being caused by the appointment, if it has taken place or is seriously contemplated, of Sir Cecil Hurst, Legal Adviser to the Foreign Office, to fill the vacancy in the World Court, at the Hague, caused by the death of Lord Finlay. Legal Advisers to the various Departments are all men of, necessarily, some academic ability; otherwise they could not aspire to write the minutes and draft the legal documents for which their several Departments call. The Foreign Office, during the time of Sir Cecil, has been particularly exacting, of course, in its demands upon its legal expert and draftsman, and Sir Cecil has not failed to rise to the occasion. But that he should be appointed to this so very eminent Judgeship would, indeed, be somewhat anomalous; members of the Bar apply for and accept these legal adviserships for a main reason, among others, that they do not see signs, possibly even hopes, of success elsewhere in their chosen profession; the younger men, who, to the number of two, in our day have left practice and possibilities of judicial promotion to go into Sir Cecil's Office, must certainly have been animated by such a modesty. Surely then the protest of the profession, voiced by its more persistent communicators to the London "Times" against the elevation of a Foreign Office Legal Adviser to such a Judgeship, must be held to be well warranted on principle. It is remarked by a well-known authority on these matters, always notably impartial and disinterested in his expressed opinions on professional matters, that "we are not concerned with Sir Cecil Hurst's abilities or his past work; it is enough that his position in the Foreign Office forbids his appointment as a Judge of this Court . . . . The Assembly or the Council," of the League of Nations, "ought, in obedience to their own principles, to reject the nomination," if the British Government persists in making it. The further criticism is made that, if the statements in the House of Commons are to be accepted as exact, the nomination comes not from any Lord Chancellor but from the late Government's Secretary of State for Foreign Affairs.

The American Lawyers, who, from the Mid-West States, now pay their visit of inspection and enquiry to England, have been fully informed, by distinguished lecturers, of the respective functions of a King's Counsel, a Junior Counsel and a Solicitor under our system; the "best bit" of any lecture being, to my mind, the quotation, in Sir Roger Gregory's address upon the work of the Solicitor, of the cynic's comment on the invidious position of the unpaid trustee with us: "I cannot imagine how anyone should ever accept the post of trustee, unless he intends to misappropriate the trust funds!" What we should all enjoy, and I have no doubt you would like to read, would be similarly detailed lectures upon the various functions of the various lawyers in the United States. We all have, for example, the vaguest and the most tantalising idea of what is indicated, especially in remuneration, by the position, unique to the United States of America so far as I know, of the permanent legal officers of the Big Corporations . . . .

Other matters which occupy, or have recently occupied, professional attention have been the conclusion of the Croydon Inquests and the quasi-controversy between the Coroner and his jury at the end of the last one; and the re-opening of the agitation, by Lord Justice Scrutton, against the "preposterous" expense of litigation these modern days. This is a subject upon which I have frequently observed in these letters; and well I may, for the fact of it tends to endanger our whole future, and the wholly illogical system of remuneration, to which Junior Counsel at any rate have to submit, results in this, as matters stand, that we work incessantly upon the preliminaries of actions which are never fought and of which the remunerative function never falls to be discharged. With very few exceptions, for example, it may be taken that the drafting and settling of the Pleading in any action entitles the workman to a fee of two guineas only, however vast the material to be worked upon and to be reduced to the compass of the Statement of Claim or Defence; and even the Advice on Evidence is, traditionally, rewarded with the same meagre fee, the rate of remuneration in both instances having become established upon the principle, once no doubt sound, that the Junior who had these tasks to perform would, at a later stage and for no very arduous work then required, receive the fee more commensurate with the work involved. It is felt that Scrutton, L.J., has somewhat spoilt the effect of his observations, by an easily recognisable understatement of the amount of leaders' fees formerly usual, the understatement being rather by implication than by expression perhaps, but certainly giving the impression that, if His Lordship spoke accurately, no leader ever received more than ten and two upon a brief, unless he was a "Star."

Of the last decision of the year, that of the most general interest is possibly of His Same Lordship's Court of Appeal, in the libel case: *Watt v. Longsdon*. The question came to the Court on appeal from Horridge, J., sitting with a Special Jury. Whether a friend or acquaintance is under any such moral duty in the social exigencies of the day, to communicate to a

spouse information received as to the conduct of the other party to the marriage, as produces, in the absence of malice, the protective privilege of occasion, is, the Court of Appeal held, a matter dependent upon the circumstances of each case, the relation of the communicator with the person to whom the communication is made and the nature of the information communicated. Horridge, J., had tended to exaggerate the general, universal nature of a privileged occasion in such a context; a new trial was ordered. If I have not said it before, I may say now with some emphasis, that we have had, at least in my day, few more able and satisfactory *Nisi Prius* Judges for this class of case, than Mr. Justice Horridge, a fact about him which neither his Court manner would lead the lay spectator to suppose nor his career at the Bar had promised.

I have no other matter to call to your attention, save the publication of the annual pamphlets of the Borstal Association and the Central Association for the Aid of Discharged Prisoners, both compiled in a spirit of modesty and in a vein of careful assessment, very refreshing and encouraging in these days of advertisement and boast. Both pamphlets give rise to one thought only of a critical nature: is not this work for the criminal individuals of the more sorely pressed classes done with a generosity and a tolerance which is almost unfair to the majority of those same classes who, notwithstanding the rigours of their life and the force of the temptations to which their weaker brethren have succumbed, keep, to their infinite credit, straight? Whenever it falls to my lot to sentence a young criminal, and to sentence him in such a manner that I know I am destining him to the most useful and possibly the most happy years of his life, I always feel this qualifying doubt; and now, seeing the pictures of life in a Borstal Institution, I feel that if I had to cope with the home and the surroundings and the circumstances which are theirs, I should unhesitatingly commit the crime that would secure me the healthy and invaluable schooling of a three years' term in a Borstal Institution. I warmly recommend the reading of both pamphlets to you; they give you cause to rejoice that you live in an enlightened age and that the development of the system of administration of justice, of which you are an agent, has led to something more than the conserving of wealth or means in the hands of those lucky enough to become possessed in the first place; it has achieved, already in a very large measure, a regeneration. The Law's excursions among criminals certainly lead to nothing but good; and the profession may take this small share of the credit of the good work, which these pamphlets almost unintentionally evidence, that it has almost entirely subordinated any discretion, which it has in the matter of sentencing, to the advice tendered to it, in general and in the particular case, by the administrative body dealing with the criminal after conviction. Both pamphlets insist upon the number of respective failures, with a view to analysing their several causes and profiting by the experience of a mistake, may be; but no one can possibly be discouraged by the fact, avowed, that there are sometimes failures on the part of Associations who are limited, for their material to work upon, to the worst available!

I recollect, at my closing hour, that there were three further matters I had noted, before the end of the term, to mention to you: recalling the Police Scandal round and about the individuality of Sergeant Goddard of Scotland Yard, you will like to know (if you have not heard upon your own account) that Rowlatt, J., overruled the demurrer pleaded by the said Sergeant and protesting that an Information was not the appropriate procedure by the Crown, whereby it might recover £12,471 in notes, accepted by the Sergeant as bribes. Eve, J., in a City company dinner identified himself as upon the side of those who resist the growing interference of the bureaucrats with the liberty of the subject, which interference was, according to him, "sometimes supported by attractive pretexts and preceded by certain harmless intrusions," and Mr. Justice Horridge, ill repaying the kind things we, of counsel, say about him and notwithstanding his harsh treatment of us, has said that if the country roads were widened, "counsel will not continue to live so adequately out of motor cases as they do now." Horridge, J., showed his sillier side, in making this utterance: only a very small proportion of running-down cases are now fought out and survive the knock-for-knock agreements of the Insurance Companies; and the life of the practitioner, who made even a half of his income out of them, could not in the wildest flight of fancy be described as "adequate."

Yours ever,
INNER TEMPLAR.

Correspondence.

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

Crown Witnesses.

Anent Mr. Leicester's article on "Tampering with Witnesses" appearing in your number of October 1st, I remember the late Mr. Justice Edwards with some solemnity announcing that witnesses for the prosecution in a criminal case were neither witnesses for the Crown nor for the accused but were witnesses "of God." His Honour's remark and his manner of delivering it have recurred to me many times since and I have often wondered quite what he meant. I know he wished it to be understood that Counsel for the accused was to be considered entitled to interview Crown witnesses because that was the point giving rise to His Honour's remark; but whether he considered the Almighty should be regarded as a party in Crown cases and that His Majesty The King or the Jury, being the "Country," do not sufficiently emphasise the impartiality required in such matters it is hard to say. I doubt whether, with his experience, he intended to suggest that witnesses in Court proceedings have a sanctity generally associated with the Deity. Perhaps it expressed a pious hope of the millenium.

I am, etc.,
"JUNIOR."
New Plymouth,
10th October, 1929.

"We have said again and again, and we now repeat, that in sentencing a prisoner regard must be had to the intrinsic nature of the offence. It is all wrong to send a man to a long term of penal servitude because at some other time, for some other offence, he has received heavy punishment."

—LORD HEWART.

Australian Notes.

(By Wilfred Blacket, K.C.)

Acting Chief Justice Ferguson was moved to the verge of wrath in the recent libel case, *Dr. Thompson v. Truth and Sportsman Ltd.* The doctor had had certain accounts outstanding and he employed an agent to collect these, giving him certain information as to the patients' ailments. Later he sued the agent for moneys collected but not paid over. There was no ground of defence to the claim but the doctor was cross-examined furiously for five hours on the information he had given to the agent, and it was on account of the report in the defendants' paper of these proceedings that the libel action was brought. In athletic words His Honour denounced such cruel and futile tactics ; but his remarks were *obiter*—His Honour in legal phrase was merely " talking to the Court clock " —and he could suggest no way of preventing such attacks upon a plaintiff suing in a just cause, nor can I, but I think that someone ought to.

The following is an advertisement which appeared in the Sydney " Morning Herald." :—

> Money on Fixed Deposit accepted by established firm solicitors. Sums from £50 to £500. Good Interest. No.—— Herald.

Two or three advertisements of this kind have recently appeared and no doubt some persons, being females, will be tempted by the " good interest." Query, would money so deposited be money " entrusted to (a solicitor) in the course of his practice as a solicitor " within clause 15 (1) of your Solicitors' Fidelity Bill ? I should think not ; money " lent " would seem not to be money " entrusted " within the meaning of that clause.

Judge White sitting in Quarter Sessions at Wollongong recently created an interesting precedent. A prisoner upon trial in a simple case of false pretences defended himself at such length that the case lasted for three and a half days, and he had addressed the jury for seven and a half hours when the Judge interposed and said that he would have to stop in ten minutes, and enforced that order. The point will probably come before the Criminal Appeal Court. It reminds me that in a Sydney Jury Court years ago a juror in his crude way endeavoured to stop an oration by Colonna Close. He rose when Colonna had been emptying the dictionary over the jury for two hours and asked : " Your Honour, are we obliged to listen to all this rot ? " And His Honour said wearily : " Yes gentlemen you are—and so am I." Then he covered his face with his hands and none could see whether he slept, or wept, or just silently endured the rest of the oration.

The General Election here has produced some new kinds of electioneering—I carefully avoid the word " propaganda," which, thank Heaven, will be heard no more till next Election—and promises to raise some new questions of law. The 35 to 34 vote against the Government which led to the dissolution was brought about by the action of five of its supporters who crossed the floor to vote with the Opposition on a fool-motion for a referendum on a question that was incapable of being made the subject of such a vote. One of the members who crossed the floor was Mr. Marks, a wealthy man, who represented a Sydney constituency. He had recently visited Hollywood and was well acquainted with some leading film-producers. A few days before the vote was taken the Federal Treasurer, Dr. Earle Page, had introduced his Budget imposing heavy taxation upon film owners and proprietors of picture shows. While the electioneering was proceeding the Sydney " Morning Herald," which strongly supported the Government, printed statements and reproduced a receipt showing that Union Theatres Ltd., a company which owns many films and picture shows, had paid for some electric signs supplied to Mr. Marks' Committee, and in the same column printed Mr. Marks' explanation of the transaction. There were also some other comments by the Herald that I, for obvious reasons, do not quote. Union Theatres Ltd. issued a writ for £10,000 against the " Herald," and it has been stated on its behalf that the statement imputed corruption on its part. Apparently the question arises whether a person who assists one political party, in order that taxation imposed by the other party may be avoided, is doing an act that subjects him to hatred and/or contempt. Avoiding the expression of any opinion on the point, I am still able to suggest that an answer in the affirmative would tend to diminish donations to party funds, so that the decision in the case should be of more than local interest. In Sydney the writ under the Common Law Procedure Act simply stated that the coveted £10,000 was for " damages," but the same plaintiff suing the " Argus," in Melbourne under the Judicature system in its statement of claim set out the words relating to payment by Union Theatres for signs for Mr. Marks and the published comment by the " Argus " : " It is obvious from this what an enormous part these interests are playing in the Election in their endeavour to bend the Commonwealth Parliament and the public men of Australia to their will. Surely the electors are not going to stand for such methods " ; and the statement of claim went on to charge that the publication imputed corruption. An application to strike out the claim as vexatious and frivolous was made to Cussen, J., whose reserved decision has not yet been delivered.

Mr. Justice Sly who died on the 12th October was for twelve years a Justice of the Supreme Court of New South Wales ; he retired in 1920 having reached the age of seventy years. He was a very careful and painstaking Judge, and an able lawyer. On one occasion however a spoonerism made a slight inaccuracy in his charge to the jury. It was a case wherein a doctor was sued for negligence. His Honour said : " Now gentlemen you have been quite properly told that you must not expect an ordinary medical man to have the high ability of a McCormick "—our most renowned surgeon—" all that he undertakes to do is to treat his patients with a reasonable degree of kill and scare. You understand that, don't you—he must exercise a reasonable degree of scare and kill." There was an appeal to the High Court and on the printed notes the words appeared just as I have written them, but the appeal never came to a hearing. And of spoonerisms, I remember another by Sir George Innes. He got his tongue caught in the phrase : " jot or tittle " and stated it in various erroneous ways. Until hearing him I did not think it possible that the phrase was capable of being stated in so many wrong ways ; but of course it must always be remembered that Sir George Innes was an exceptionally able man.

In your number of May 14th (*ante* p. 127) I mentioned the decision of Long Innes, J., to the effect that Mr.

E. R. Abigail, solicitor, who had lent his own moneys to the extent of £89,000 in seventy-one transactions during three years, was not a "money lender" within the meaning of the Act. This decision, you may be interested to learn, has been affirmed by the Full Court, in a decision that will be reported in the N.S.W. Law Reports.

The Privy Council.

New Zealand Appeals.

When the question of the abolition of the right of appeal to the Judicial Committee of the Privy Council was recently mooted, New Zealand was not slow to indicate its desire for the retention of that right. Of considerable interest is the following editorial comment of our English contemporary, the "*Law Journal*," in its number of 14th September last :—

"The Prime Minister of New Zealand has officially announced that this Dominion has no intention of altering the present position maintaining the right of appeal to the Judicial Committee of the Privy Council. The news is good hearing, for, if the appeals from New Zealand have during the past few years been infrequent and rare, a somewhat difficult situation of the longer past (the blame for which was, in the main, at the home end) was very happily cleared up during the course of a series of appeals heard three or four years ago, and a very happy relationship was then established between the far removed jurisdictions. The present Chief Justice, Mr. M. Myers, K.C., as he formerly was, came over to argue in all five appeals ; and, save for a small loss in that in which he appeared for the respondent, and in which he for the most part held the judgment, he succeeded in them all ! Another member of the New Zealand Bar, Mr. M. Gresson, also came to this country (no mean journey !) as well to make our acquaintance as to argue in the appeals. Both received an enviable ovation at their Lordships' Bar and among the profession ; and in both cases, the impression which they took away, though said by them to be of the happiest, could be no happier than the impression they left behind. From an Imperial point of view, generally, and for us particularly, it is a very fortunate thing that between us and almost our most distant outpost a regard as strong and as affectionate should prevail as exists anywhere in the length and breadth of the whole English-speaking areas of the world."

A Short Form.

The Solicitors' Journal gives the following as the will of Frederick E. Castles, Insurance Broker, New York :—

"All my earthly goods I have in store
To my dear wife I leave for evermore.
I freely give—no limit do I fix
This is my will and she the executrix."

Law Reports.

Some Notes on the History of Law Reporting in England.

(*Concluded from p. 302*)

The law reports, though regularly compiled for some three centuries following upon the discontinuance of the Year Books, were not compiled upon any systematic or harmonious plan. Not only was the compilation of this invaluable source of law an haphazard undertaking, but its preservation and publication was in most instances due entirely to chance. The compilations as and when made were not, in the vast majority of cases, intended to be more than rough notes for the compiler's own use. A lawyer, specialising perhaps in a particular branch of the law, would form the habit of attending a particular court, even when not professionally engaged therein, for the purpose of making notes for future reference. Colleagues, hearing of the existence of these notes, would borrow them from time to time. From these rough notes, the labour of one industrious student of the law, borrowed by several, developed, in process of time, printed publications sold for the private profit of the compiler.

The eminent reporter Burrow, who specialised on cases decided in the King's Bench Division between the years 1756 and 1772, takes us behind the scenes in his Preface dated 1765 : "It may naturally be asked 'Why I publish at all ?' . . . I found myself reduced to the necessity of either destroying or publishing these papers, which were originally intended for my own private use and not for public inspection. For as it was become generally known that I had taken some account (good or bad) of all the cases which had occurred in the court of King's Bench for upwards of forty-five years, I was subjected to continual interruption and even persecution by incessant applications for searches into my notes. . . . . This inconvenience grew from bad to worse, till it became insupportable ; and from thence arises the present publication."

It was long obvious that such a chaotic means of procuring quotable sources of the common law should be ended, but it was not until 1865 that the system now in vogue was at last put into operation. In that year, the "Incorporated Council of Law Reporting for England and Wales" began to issue its series of monthly law reports, which are quotable, without question, in any court of law. The Law Reports are not in the real sense of the term "official" ; they are compiled and published by a co-operative, self-supporting, commercially-managed body, which, however, is controlled by a joint committee, on which representatives of official legal organisations sit. The Attorney-General, the Solicitor-General and the President of the Law Society are, indeed, *ex-officio* members. Twelve other members are elected by the Inns of Court, the General Council of the Bar, and the Law Society.

The Council zealously preserves its independence of the Courts, appointing its reporters (some two dozen or more members of the Bar, each assigned to a particular court or class of case) without reference to the Courts—with one exception ; the House of Lords makes its own appointment, though even there the Court, as a rule, invites the Council to make the nomination. The

Council enjoys, however, the co-operation of the Courts; the Judges of the Chancery Division always receive and generally revise the proofs of their judgments, a practice which obtains, also, with most of the Judges of the other Divisions.

Besides the Law Reports issued by the Council of Law Reporting, other series have acquired the status of "authorised" reports, conferred upon them by custom and the effect of judicial decisions. The closest rival, perhaps, to the Law Reports is the monthly series of *Law Journal Reports*, which has been published continuously since 1822; the Judges revise their judgments for this series also. Other notable series are those issued by *The Times*, *The Law Times* and *The Justice of the Peace*.

The "authorised" reports and many of the "unauthorised" (a distinction which is not always, or officially, clearly marked) are concerned exclusively with the reports of cases of definite legal importance—in other words, leading cases. Very many journals, however, which have a special, or professional, or technical appeal to limited sections of the community only are at pains to include in their reports of law cases as many cases as possible which have relation to their particular interests, whether or not they have also a legal interest. Such reports are often invaluable, as containing expositions of professional or trade customs, even to the lawyer; they have in any event news value of interest to their particular readers. Innumerable examples of such series are to be met with in the worlds of commerce and industry, most trade papers making a regular feature of law reports; or, again, in the journals which circulate amongst accountants, engineers, doctors and the like.

Pending the publication in the Law Reports of a leading case, the *Weekly Notes* and the Notes of Cases in the legal journals provide a useful means of learning of recent decisions; these reports, however, are not quotable, at any rate in the Court of Appeal: *R. v. Loveridge*, (1902) 2 Ch. 859.

Ridley, J's. Lapse.

Ridley, J., was presiding over the Shrewsbury Summer Assizes, and an hot summer Assize at that. The prisoner, who was defending himself from the dock, clearly fancied himself as an eloquent speaker, and he gave an inordinately lengthy display of his gifts. The learned Judge, having asked him if he wished to give evidence or to call witnesses, and having been assured that the accused merely wished to speak from the dock, allowed his attention to wander a little. It was even observed that his eyes were shut. The accused in the dock at length wound up an impassioned, if interminable, appeal to the jury in these words: "I have only one witness to my innocence, gentlemen of the jury, and that is the Almighty." There was a dead silence in the Court where the Judge's was not the only attention that was wandering. Meanwhile the silence was enough to recall the judicial attention, and His Lordship immediately addressed himself to the concluding sentence. "Look here," he said to the accused, "if you have a witness to call, as I understand you to say that you have, he must be called, and must go into the box and be sworn in the ordinary way." The learned Judge, unconscious of any obstacle in the way of carrying out his suggestion, and indeed impatient at the delay, sat waiting for the witness to appear.

Forensic Fables.

THE EXPERIENCED JUDGE, WHO EXPLAINED TO THE JURY THE LAW RELATING TO CONTRIBUTORY NEGLIGENCE.

There was Once an Experienced Judge who Tried a Running-Down Case. The Defendant Pleaded that the Said Accident was Due to the Negligence or Alternatively the Contributory Negligence of the Plaintiff. The Experienced Judge (who was a Person of Robust Intellect) Requested the Jury to Say whether the Disaster in Question was Caused by the Negligence

of the Plaintiff or by that of the Defendant. As the Result of an Application for a New Trial the Experienced Judge Gathered that he had Failed to Explain Sufficiently to the Jury the Law Relating to Contributory Negligence. Shortly Afterwards the Experienced Judge had Another Running-Down Case to Try. This Time he Determined there should be no Mistake about the Law. So he Told the Retired Draper, the Lady in Glasses, the Dejected Publican, and the Nine Others who Composed the Jury All About It. They were, he said, to Consider whether (if they Thought that the Motor had in fact been Guilty of Contributory Negligence) the Taxi-Cab could by the Exercise of Reasonable Care have Avoided the Consequences of Such Contributory Negligence. Further, they Must Ask themselves whether it was the Motor or the Taxi-Cab which had the Last Opportunity of Avoiding

the Negligence of the Other. Thirdly, they must Enquire whether the Negligence of the Motor, or that of the Taxi-Cab, could be Deemed to be the Proximate, as Distinguished from the Remote, Cause of the Plaintiff's Injuries. Fourthly, they must Tell him whether they Regarded the Negligence of Either as the Efficient or Decisive Cause of The Accident. Lastly, they Must Bear in Mind that if the Confusion of the Driver of the Motor was Induced by the Want of Skill and Caution of the Taxi-Cab they should Give Due Weight to that Fact in Forming an Opinion as to the Degree of Responsibility which must be Attributed to the Former. The Experienced Judge then Read to the Jury at Length the Various Relevant Judgments Contained in the Law Reports. He Finished Up with the Speeches of Their Lordships in *The Volute*, (1922) 1 A.C. 129, Adding, however, the Warning that the Jury might Disregard the Provisions of the Maritime Conventions Act, 1911. After an Absence of Four Hours the Jury Announced that there was no Hope of their Agreement. As the Plaintiff's Financial Resources were Now Exhausted the Case gave no Further Trouble.

MORAL: *Explain the Law to the Jury.*

Solicitors' Fidelity Fund.

Amendments to Bill Made by Statutes Revision Committee

Several amendments as regards minor matters appear in the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Bill as reported from the Statutes Revision Committee. A verbal alteration of no apparent consequence is made in Clause 3 dealing with the application of the Act. From Clause 14 the words empowering the Council to invest the fund otherwise than in trustee securities are struck out, and so is Subclause (2) authorising the payment of the income derived from the investment of the fund while the fund amounts to or exceeds £100,000 to the general account of the New Zealand Law Society. The proviso to Clause 18 the effect of which was to debar any solicitor to whom the Bill applies or any person practising as a barrister from claiming against the fund is also struck out.

Promotion to Law Lordship.

The promotion of a Judge of first instance to the House of Lords, without taking the Court of Appeal on his way, is unusual, though not unprecedented. It happened half a century ago in the case of Lord Blackburn, and a more recent instance is that of Lord Parker, who went from the Chancery Division to the House of Lords in 1913, and who did distinguished judicial work there and in the Privy Council during the war. The latest example is the appointment to the House of Lords, in February last, of Tomlin, J., of the Chancery Division. A more signal instance of promotion was that of Lord Macnaghten, who went straight from the Bar to the House of Lords.

Bills Before Parliament.

Arms Amendment. (HON. MR. WILFORD). Firearms or ammunition brought to New Zealand without permit may be seized and detained by any officer of Police or Customs: subsection added to S. 6 of principal Act accordingly.—Cl. 2. S. 7 of principal Act amended by omitting from subsections (1) and (2) words "firearm, ammunition, or explosive," and substituting word "pistol"; subsection (3) repealed; nothing in Section to apply to importation of pistols into New Zealand by a licensed dealer; S. 3 (2) of Act of 1921-22 repealed.—Cl. 3. Word "pistol" substituted for "firearm" in S. 9 of principal Act.—Cl. 4. S. 11 (4) repealed.—Cl. 5. S. 12 (1) amended by omitting words "for the purchase of which a permit is required by this Act."—Cl. 6. Police officer having reasonable grounds to suspect that any person has in his possession or control any firearm, ammunition, or explosive, and that such person is of unsound mind, or in state of intoxication, or has attempted to threatened to kill or do serious injury to himself or other person, may without warrant search person or place, detain such person for purposes of search, and seize and detain any such firearm, ammunition, or explosive. S. 15 amended by adding subsection accordingly.—Cl. 7. Subject to order of Magistrate under S. 19, firearms, ammunition, or explosives detained for not less than six months may be disposed of as Commissioner of Police may direct.—Cl. 8. Ss. 6, 7, and 8 of Amendment Act of 1921-22 repealed.—Cl. 9. S. 12 of Amendment Act, 1921-22 amended by omitting word "firearms" where first occurs and substituting word "pistols," and by omitting words "guns or."

Coroners Amendment. (MR. MACMILLAN). Supreme Court, upon application by Attorney-General, if satisfied (a) that a coroner refuses or neglects to hold an inquest which ought to be held or (b) by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, discovery of new facts, fresh evidence or otherwise it is necessary or desirable in the interests of justice that another inquest should be held, may order an inquest to be held and quash inquisition of inquest previously held. Court may order inquest to be held either by same or other coroner. Act to apply to inquests held after 1st January, 1928. Nothing in Act to prejudice or restrict any power or authority now vested in Supreme Court with reference to coroner's inquests.

Imprest Supply (No. 4). (RT. HON. SIR JOSEPH WARD.) Authorising imprest grant of £2,006,000 out of funds and accounts in First Schedule and imprest grant of £339,000 out of accounts in Second Schedule.

Imprisonment for Debt Limitation Amendment. (MR. MASON.) Paragraph (e) of S. 7 of principal Act, empowering Court to make an order on judgment summons where debtor has sufficient means and ability to pay the debt, or where he is about to leave New Zealand without paying the debt or to depart elsewhere within New Zealand with intent to evade payment, repealed.—Cl. 2. Proviso to S. 8 of principal Act, preventing making of order of committal where judgment creditor a debt-collector, repealed.—Cl. 3.

Licensing Amendment. (MR. MASON.) Subsection (8) and (15) of S. 11 Amendment of Licensing Act, 1914, amended so as to extend powers conferred by wine-maker's license.

Native Trustee Amendment. (HON. SIR APIRANA NGATA). Prescribing additional classes of security for investment of moneys in Native Trustee's account.—Cl. 2. Alienations of property to Native Trustee pursuant to S. 24 of principal Act not to require confirmation under Native Land Act, 1909.—Cl. 3. S. 11 of Amendment Act, 1921-22, as to application of profits of Native Trust Office amended.—Cl. 4. Extension of provisions as to advances from Native Trustee's account in respect of administration of estates or reserves.—Cl. 5. Authorising Native Trustee to lease Native reserves for periods not exceeding twenty-one years.—Cl. 6. Powers of leasing Poukawa Native Reserve.—Cl. 7. Authorising Native Trustee to grant to any local authority easements in respect of drainage or sewerage operations.—Cl. 8.

Transport Law Amendment Bill. (HON. MR. VEITCH). The provisions of this Bill of some sixty clauses are too lengthy to permit of detailed summary in this column. The following is a summary of the explanatory memorandum annexed to the Bill.

Part I.—Transport Department. Provides statutory recognition of the recently constituted Transport Department and

defines its functions. The Department is charged by the Act with the administration of the enactments mentioned in the Schedule, all of which have reference to transport matters, and more particularly to motor transport. Part II.—Motor-vehicles Amendment. The important amendments proposed in this Part are—(1) All exemptions from the payment of annual license fees are abolished. (2) Provision is made for altering the system of licensing motor-drivers; in future such licenses will be issued by the Registrar of motor-vehicles, or by a Deputy Registrar, instead of by local authorities, thus simplifying the procedure as to their annual renewal. The license fees will, however, continue to be paid to local authorities. (3) Provision is made for the compilation by the Justice Department, for the use of the Transport Department, of monthly lists of persons whose drivers' licenses have been endorsed or suspended by any Court. Part III.—Motor-omnibus Traffic. 1. It is proposed in this Part to make motor-omnibus districts coterminous with highway districts under the Main Highways Act. This change will bring within the scope of the Act those motor-omnibuses that are now carrying on business outside any motor-omnibus district. 2. Under the present law, licenses to carry on motor-omnibus services are granted by local authorities which, in most cases, are themselves enaged in carrying on the same class of service. It is proposed by the Bill to substitute a specially constituted licensing authority for each district, consisting of officials and of representatives of the interests affected. 3. A central licensing authority is constituted to deal with applications for motor-omnibus services to be carried on in two or more motor-omnibus districts. 4. A Dominion Transport Appeal Board is constituted to hear appeals from the decisions of licensing authorities. 5. Where applications for licenses in respect of motor-omnibus services are made by any local authority or by the Minister of Railways, and also by a private person, in respect of the same routes, the licensing authority is, in the circumstances defined in clause 38, required to give preference to the local authority or Minister over other applicants. Where the renewal of the license of a private person is refused on the ground that the service would be in competition with the service of a local authority or the said Minister, the licensee is entitled to require the local authority or Minister, as the case may be, to take over his undertaking, at a price to be agreed on, or to be determined by a Compensation Court. 6. The method of fixing the price to be paid for any such undertaking is substantially the same as is already prescribed by section 15 of the Motor-omnibus Traffic Act, 1926, except that a licensee is expressly declared to be entitled to receive compensation for the loss of his license in addition to the value of the property taken over from him. 7. Special provision is made for the issue of permits for the use of licensed motor-omnibuses on special occasions (for example, race days and holidays). 8. Additional provisions are made with respect to accidents occurring in connection with motor-omnibus services, to permit of the holding of formal investigations into the causes and results thereof. Part IV.—Motor-vehicles other than motor-omnibuses carrying on Transport Services on Definite Routes, according to a Time-table. It is intended to apply, with the necessary adaptations, the provisions of the Motor-omnibus Traffic Act to other motor-vehicles carrying on transport services of passengers or goods on definite routes and in accordance with a time-table. Part IV enables this to be done when the Department is ready to undertake the work of licensing, inspection, &c. Part V.—Modification of certain Local Acts. The sole purpose of this Part is to restore the jurisdiction of licensing authorities under the Motor-omnibus Traffic Act within the areas of the Auckland Transport Board and the Christchurch Tramway Board. Part VI.—Main Highways. The principal amendments of the law proposed to be made in this Part are—(1) The North Island and the South Island are to be separately represented on the Board. In matters affecting the North Island, South Island representatives are not entitled to vote; and, similarly, North Island representatives cannot vote on South Island proposals. (2) Provision is made for the allocation between the North Island and the South Island of the moneys available in any year for the maintenance of main highways. (3) A limited authority is conferred on the Board to assist local authorities in the maintenance of roads and streets that are not main highways. The amount to be expended for this purpose is limited in any year to £150,000. Part VII.—Motor-spirits Taxation. Provision is made by this Part for the imposition of an excise duty on motor-spirits produced in New Zealand. Provisions are also made with respect to refunds of duty on motor-spirits that are destroyed or are used otherwise than in motor-vehicles. Part VIII.—Amendment of Public Works Act. It is proposed in Part VIII to repeal the present express prohibition of the use of certain specified classes of motor-lorries contained in section 164 of the Public Works Act, 1928, and the limitations as to the use of six-wheeled motor-lorries contained in section 165. The use of these vehicles can be effectively dealt with under section 166 of that Act, which provides both for the classification of motor-vehicles and for the classification of roads and streets. Part IX.—Tramways Amendment. The only matter dealt with in this Part has reference to what are known as "one-man trams," in which there is no conductor as distinguished from the driver. Part X.—General. Drivers' licenses and licenses in respect of heavy motor traffic to be issued by the Post Office: fees will be collected by the Post Office, and will then be allocated to the local authorities entitled to receive the same. Clause 61 prohibits the practice that has been adopted by certain local authorities of fixing the remuneration of their Traffic Inspectors by reference to the amount of the fines recovered in respect of offences.

New Books and Publications.

The Companies Act, 1929. By Sophian. (Sweet & Maxwell Ltd.). Price 15/-.

Everyman's Own Lawyer. Fifty-ninth Edn. 1929. By a Barrister. (Crosby Lockwood). Price 18/-.

Local Government Act, 1929. By R. A. Glen. (Eyre & Spottiswoode). Price 24/-.

Recent Changes in Company Law and Accounts. By W. Barrie Abbott, B.L., C.A. (J. Blackwood & Son). Price 6/-.

Trial of Jean Pierre Vaquier. (Notable British Trials). Edited by H. H. Blundell and R. E. Seaton. (Butterworth & Co. (Aus.) Ltd.). Price 9/-.

Practical Guide to the Duties and Liabilities of Trustees in Bankruptcy and Trustees under Deeds of Arrangement. By Alma Roper. (Sweet & Maxwell Ltd.) Price 47/-.

Final Forensic Fables. By "O." (Butterworth & Co. (Pub.) Ltd.) Price 4/6.

Topham's Company Law. Seventh Edition. By A. F. Topham, LL.M., K.C. (Butterworth & Co. (Pub.) Ltd.) Price 9/-.

Personal Actions at Common Law. By R. Sutton, M.A. (with a Foreword by Lord Atkin of Aberdovey). (Butterworth & Co. (Aus.) Ltd.). Price 15/-.

Willis' Workmen's Compensation Acts (with Notes, Rules, Orders and Regulations). Twenty-sixth Edition. By W. Addington Willis, C.B.E., LL.B. (Butterworth & Co. (Pub.) Ltd.). Price 18/-.

Changes in Company Law, 1929. By P. J. Sykes. (Butterworth & Co. (Pub.) Ltd.) Price 7/-.

Butterworth's Workmen's Compensation Cases, 1928. Volume 21. Edited by His Honour Judge Ruegg, K.C., and Edgar Dale. (Butterworth & Co. (Pub.) Ltd.) Price 26/-.

The Life of Sir Edward Marshall Hall. By Edward Marjoribanks, M.P. (Gollancz). Price £1 9s.

The Law of Income Tax. Fourth Edition. By E. M. Konstam, K.C. (Stevens & Sons Ltd.). Price £2 7s.

Tudor on Charities. Fifth Edition. By H. G. Carter and F. M. Crawshaw, B.A., LL.B. (Sweet & Maxwell Ltd.). Price £3 10s.