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

"Under the stern panoply of the law there are human beings." —*Sir Henry Page Croft, M.P.*

Vol. V. Tuesday, November 26, 1929 No. 20.

Peremptory Challenge of Jurors.

The right of peremptory challenge of jurors in criminal cases has been recently brought into prominence in England by the course taken by counsel for the accused in two successive cases before the Recorder of London at the Central Criminal Court. In the first case—a charge of a sexual offence against a female child aged eight—counsel for the defence successfully objected, by means of his right of peremptory challenge, to all women serving on the jury, and in the second, which concerned the possession of house-breaking implements, the accused's counsel challenged peremptorily the whole twelve members of the jury. We, in New Zealand, have not yet followed England's example in permitting women to serve upon juries, and, whatever view may ultimately come to prevail upon the question, there is no doubt that any proposal directed towards that end would meet, in this country, with very considerable opposition, and, although it may be that as regards cases of the class to which that first-mentioned belongs there is something to be said for the learned Recorder's view that the assistance of women jurors is of great advantage, few New Zealand lawyers are likely to agree with his observation as to the right of peremptory challenge: "I object to the practice, but I cannot stop it."

So far as can be gathered from our English contemporaries it seems that the right of peremptory challenge has fallen into disuse, or at all events has been exercised but rarely in recent years. The *Law Times* speaks of counsel as having "availed himself of the *old* right of peremptory challenge devised for the protection of felons in the days of formidable subsidiary penalties." The *Justice of the Peace*, always in touch with criminal practice, refers to the "*antiquated* right of peremptory challenge of jurors in cases of felony"; and the *Law Journal* and *Solicitors' Journal* both agree that it is unusual for the right of peremptory challenge, which admittedly exists, to be exercised. So astonishing is this to the New Zealand practitioner who is accustomed to seeing in every case in which a jury is involved, whether criminal or civil, the right of challenge vigorously invoked, counsel—with a little embarassment occasionally, perhaps, to the juror challenged within an inch of taking his seat—endeavouring to conserve their challenges by announcing them only at the latest possible moment, that one at once inquires whether there is any material difference between our law and the English law on the matter likely to account for the desuetude of the right in England while it is so universally, and so zealously, availed of here.

It seems that in England peremptory challenges are allowed to the defence in all cases of treason and felony, but not in cases of misdemeanour. In certain cases of high treason the number is thirty-five: in other cases of treason, and in murder and all other felonies the number is twenty. In cases of misdemeanour, though no right of peremptory challenge exists in England, it is usual for the officer on application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or by the defence, taking care that enough are left to form a jury, and this practice has, although there is no modern reported illustration of it, often been sanctioned by the Court: *Archbold*, 27th Edn., 197, 198. No right of challenge without assigning cause exists, curiously enough from our point of view, in civil cases: *Creed v. Fisher*, (1854) 9 Exch. 472; *Pearse v. Rogers*, (1860) 2 F. & F. 137. It may be that the very lack of reason in the English law is in part responsible for the right of peremptory challenge having fallen into disuse. Why a right of challenge in some criminal cases and not in others? Why no right of challenge in civil cases? What justification is there now for the different number challengeable in some cases of treason? Further, even the practice as regards the exercise of the right does not seem to be settled and different methods of empanelling a jury are adopted in different counties—*Roscoe*, 15th Edn., 279: this apparently explains what to us seems the unusual method adopted in the second of the cases mentioned above of peremptorily challenging the twelve jurors, not one by one, but after twelve have been called, and before they have been sworn.

But while these apparent anomalies in the English law and the absence of settled procedure may in part account for the right having come to be regarded as obsolete, probably more is due to the fact that in England juries are drawn from very large and densely populated areas with the result that in any given criminal case the jurors are persons of whom and of whose sympathies the accused and his counsel know absolutely nothing; in such circumstances a peremptory challenge would generally be a leap in the dark. In New Zealand, however, it is very different. In the country centres where the Supreme Court sits on circuit it may in some cases—though this is, of course, the exception rather than the rule—be found extremely difficult, even making full allowance for the exercise of the right of challenge, for one or other of the parties to obtain a fair and impartial trial by jury, and to prevent such a state of affairs a change of venue has to be ordered as in *Dahl and Co. v. Allen*, 13 G.L.R. 126; *Reedy v. Westport Harbour Board*, (1916) N.Z.L.R. 352, and *Gawler v. Douglas*, (1916) N.Z.L.R. 706. In almost every case in such centres it is found that some of the jurors on the panel are personally known to one or other of the parties or his advisers, and it is then that the desirability of the right of challenge becomes at once apparent. The same state of affairs exists, though of course to a lesser extent, even in our four chief Supreme Court centres. And there are always other matters, which it is unnecessary to state at length, but of which may be mentioned as illustrations the occupations of jurors as shown on the jury panel and what Blackstone has described as the "sudden and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," which guide counsel in their exercise of this right. It is indeed difficult to conceive that in New Zealand such an important factor in the administration of justice as the right of peremptory challenge will ever fall into disuse.

Court of Appeal.

Myers, C.J.
Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

September 26; October 10, 1929.
Wellington.

RAYNER v. THE KING.

Crown Suits—Practice—Discovery—Suppliant in Suit Against Crown Commenced by Petition of Right Not Entitled to Discovery from Crown—Observations as to Practice of Crown as to Discovery—Crown Suits Act, 1908, Ss. 27, 34—Rule 161 of Code of Civil Procedure.

Notice of motion filed by the Solicitor-General for an order setting aside an order of discovery taken out in a petition of right by the suppliant in purported pursuance of Rule 161 (a) of the Code of Civil Procedure. By consent the motion was removed into the Court of Appeal.

The Solicitor-General (Fair, K.C.) and Currie for Crown.
Gray, K.C., and James for suppliant.

MYERS, C.J., delivering the judgment of the Court, said that it seemed tolerably plain that Rule 161 (a) was never intended, and its language was not sufficient, to authorise the taking out of such an order as against His Majesty. That indeed was scarcely disputed; and the Court was invited not to dispose of the matter upon technical grounds arising under Rule 161 (a), but to consider and deal with the case as if the order of the 13th March had been made on application in that behalf under Rule 161 and the present proceeding were an application to set aside such order. In other words the Court was invited to consider the neat question whether an order for discovery could be made against the Crown in a suit commenced by petition under Part II of the Crown Suits Act, 1908, and the argument proceeded on that basis.

It was clear that in England an order for discovery against the Crown could not be made. That was admitted by Mr. Gray; but he contended that the English authorities had no application in New Zealand, having regard to the provisions of the Crown Suits Act, 1908, and he relied upon the decisions in cases arising under the Australian Acts, which he contended were applicable to the New Zealand statute. Their Honours thought that the English decisions were, and that the Australian cases were not, applicable in that respect to our Crown Suits Act. His Honour read Section 34 of the Act and said that subject to one particular matter that would be referred to later, the Section was similar, in all material respects, to Section 7 of the Petitions of Right Act, 1860, of the Imperial Parliament. His Honour referred to and discussed **Thomas v. The Queen,** L.R. 10 Q.B. 44; **Tomline v. The Queen,** L.R. 4 Exch. 252; **Attorney-General v. Newcastle-upon-Tyne Corporation,** (1897) 2 Q.B. 384; **In re La Societe les Affreteurs Reunis and the Shipping Controller,** (1921) 3 K.B. 1, and said that the whole question for determination in the present case seemed to be whether Section 34 of the Crown Suits Act was substantially different from Section 7 of the Petitions of Right Act, 1860, or whether Section 27, to which reference would be made later, affected the position.

While Section 34 of the New Zealand Act, like Section 7 of the English Act, enacted that "so far as the case may be applicable" the laws, statutes, and rules in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and of taking evidence, set-off, limitations, and appeal in personal actions between subject and subject, and the practice and course of procedure of the Court in its legal and equitable jurisdiction respectively for the time being in reference to such suits and personal actions should be applicable and apply and extend to proceedings on a petition under Part II of the Act, the New South Wales statute which the Privy Council had to consider in **Jamieson v. Downie,** (1923) A.C. 691, 92 L.J.P.C. 185, like the statutes in all the other cases upon which Mr. Gray relied, first of all provided for a petition being defended by a nominal defendant, and then further provided that the proceedings and rights of parties should as nearly as possible be the same as in an ordinary case between subject and subject. The power to ask for and obtain discovery was spoken of in many decisions as being a "right"; and in **Commonwealth v. Miller,** 10 C.L.R. 742, Isaacs, J., at pp. 754-755 referred to the authorities and said that he had no doubt that the power to ask for and obtain discovery was a "right" within the meaning of Section 64 of the Judiciary Act, 1903 (Com.), which enacted that in any suit to which the Commonwealth or a State was a party the rights of parties should as nearly as possible be the same as in a suit between subject and subject. At p. 755 the learned Judge referred to **Ramsden v. Brearley,** 33 L.T.N.S. 322, where Lush, J., distinguished between the right and the remedy. Both Isaacs, J., (p. 753) and Higgins, J., (p. 757) based their opinion solely on the construction of Section 64. Griffiths, C.J., at p. 746, spoke of the obtaining of discovery as a right, a right which continued to exist unless taken away, and, he added: "It is one of the rights conferred by Section 64." And in **Jamieson v. Downie** (*cit. sup.*) Lord Buckmaster spoke of "the general right of the Crown to resist discovery."

Their Honours had already said that so much of Section 34 of the New Zealand Act as they had been considering appeared to be in all material respects similar to Section 7 of the English Act. That being so, the same distinction as was shown by the judgment of the Privy Council in **Jamieson v. Downie** to exist between the position in England and that in New South Wales in regard to discovery existed, in their Honours' opinion, as between New Zealand and New South Wales. Inasmuch as the other Australian authorities relied on by Mr. Gray all depended upon statutory provisions similar to those of the New South Wales Act under consideration in **Jamieson v. Downie** and were, therefore, distinguishable, their Honours did not think it necessary to refer to them further; but it was not unimportant to observe that in Victoria, in 1887, in **Regina v. The National Insurance Co.,** 13 V.L.R. 391, under a section of a statute in terms similar to Section 7 of the Petitions of Right Act, 1864, the Court followed **Thomas v. The Queen** (*cit. sup.*).

The difference between Section 34 of the New Zealand Act and Section 7 of the English Act was that the former contained the words "and all other laws, statutes, and rules available as between plaintiffs and defendants in personal actions between subject and subject," in substitution for the words in the English Act, "and proceedings in error in suits of equity and personal actions between subject and subject." Their Honours did not consider, however, that the difference was a material one. The whole Section, in their Honours' opinion, dealt only with matters procedural; and the words "and all other laws," etc., were words *ejusdem generis* with those preceding and following. The Section opened, as the English Section did, with the words: "So far as the same may be applicable," and in their Honours' opinion the same difficulties existed as in England in the way of ordering discovery against the Crown and for the same reasons.

Alternatively Mr. Gray relied upon Section 27 of the Crown Suits Act, 1908. There again it seemed to the Court that the Section dealt only with matters of procedure and practice, and did not confer any new rights upon the suppliant, or take away any of the rights of the Crown. The mere fact that other Sections of the Act might confer new rights of action against the Crown did not of itself, as it seemed to their Honours, affect the construction of either Section 34 or Section 27.

Their Honours were, therefore, of opinion that a suppliant was not entitled to an order of discovery as against the Crown on a petition of right under Part II of the Crown Suits Act, 1908, and that the order for discovery taken out by the suppliant must be set aside.

Their Honours might add, and in doing so they said no more than had been said by the Courts in some of the English cases, that the practice of the Crown always had been to give an opposite party inspection of relevant documents without any order for discovery, subject only to considerations of public policy; and it was to be hoped that no departure would be made in this or any other case from that fair and proper practice. Whether or not any application was made in the present case for inspection prior to the issue of the order for discovery the Court was not informed, but plainly, the order having been taken out, it was proper and necessary for the Crown to move to set it aside in order to obtain a determination on a question of considerable general importance. It might be that, in view of the increased and increasing activities of State Departments in modern times, an alteration of the law in regard to discovery and cognate questions was desirable, but that of course was a matter entirely for the Legislature.

Order set aside.

Solicitors for suppliant: **Hall Skelton and Skelton,** Auckland.
Solicitor for respondent: **Crown Law Office,** Wellington.

Supreme Court

Herdman, J. September 12; October 3, 1929.
Auckland.

TURKINGTON v. PHELAN.

Local Government—Municipal Corporation—Transport Board—Power of Local Authority to Remove Member or Members of Board Appointed by It and Appoint "Another and Others"—No Power to Remove Member Without Appointing Another Member in Substitution—Removal of Six Members and Subsequent Re-appointment of Same Members *ultra vires*—*Status quo* **Remaining and Original Appointments Unaffected—Plaintiffs Claiming Right to Elect Members in Place of Members Removed—Question of Interference With Public Right—Attorney-General Necessary Party to Proceedings—Supreme Court Without Jurisdiction in Proceedings by Reason of Special Statute Empowering Magistrates' Court to Determine Whether Member "Incapable of Holding His Office" and Taking Away Jurisdiction of Supreme Court—Auckland Transport Board Act, 1928, Ss. 6, 10, 11, 14, 76.**

Proceedings under Rule 464 of the Supreme Court Code to obtain an order of the Court removing the defendants from office or declaring who was entitled to hold the office in question. On 8th November, 1928, the Auckland Transport Board Act, 1928, came into force, and on 15th November, 1928, the Auckland City Council, acting under the powers conferred upon it by Section 6 (a) of the Act, appointed the six defendants to be members of the Auckland Transport Board. Those gentlemen on that date were all members of the Auckland City Council. At an election for the City Council held on 1st May, 1929, the defendant, Allum, was a candidate for election but was defeated at the polls. On 3rd May, 1929, Allum wrote a letter to the Mayor of Auckland enclosing a letter addressed to the Secretary of the Auckland Transport Board in which he tendered his resignation as a member of that corporation. That letter was never delivered to the Secretary of the Transport Board. On 22nd May, 1929, the Town Clerk sent out a notice of a special meeting to members of the Auckland City Council, stating that the business of the meeting would be (1) to deal with Mr. Allum's resignation from the Board, and (2) to consider a motion by Councillor Bloodworth. The motion referred to was a motion that in pursuance of the powers vested in it by Section 6 (a) of the Auckland Transport Board Act, 1928, the Council should remove from membership of the Auckland Transport Board the six persons whom the Council elected to membership of the Board on November 15th, 1928. The Council duly met on 28th May, 1929, and carried the motion. Allum having been removed from the Transport Board as a result of the motion it was assumed that the necessity for a consideration of Allum's letter to the Mayor disappeared. The special meeting was then adjourned to 30th May, 1929, for the purpose of appointing six members of the Board. The members of the Council were notified of the date upon which this meeting was to be held and of its purpose. The meeting was duly held and, after several abortive attempts to fill the vacancies on the Board, Councillor Paterson submitted a motion: "That individual nominations be received, and if in excess of six, a vote of Council be taken and on a majority vote of Council be appointed." The motion was carried and the Council then proceeded to receive nominations and to make their selection. The voting for the various nominees was conducted openly by a show of hands, the result being that Messrs. Phelan, Baildon, Ashley, Entrican, Coyle, and Allum received the highest number of votes, and were declared by the Mayor to be elected members of the Board. Thus the members of the Board who were removed from office on 28th May were re-appointed on 30th May. It was contended that these appointments were invalid.

Northcroft for plaintiff.
Johnstone and Stanton for defendants.

HERDMAN, J., said that it was submitted on behalf of the plaintiffs that the appointments made on 30th May were invalid for two reasons: first the notice convening the special meeting should have stated that appointments were to be made to fill the vacancies on the Board caused by the removal of the defendants; and secondly, the Act did not authorise the re-appointment of members who had been removed from office but contemplated the appointment of persons other than those who had been deposed. The Section spoke of "another or others." To the latter argument it was replied by the defendants that a consideration of the provisions of the Statute showed that, unless there was in existence a resolution of the Council which proved that a change in the personnel of the representatives of the Council had been brought about by new appointments, the original appointments stood. In the present case, notwithstanding various attempts made to nominate new members to the Board, the proceedings terminated without any change having been effected. The very men who held office under the appointment dated 15th November, 1928, were again selected by the Council on 30th May, 1929.

That brought His Honour to a consideration of the provisions of the Statute. After referring to the title of the Act and to Section 76, His Honour quoted Section 6 (a), the provision under which Mr. Bloodworth and his fellow Councillors acted. Subject to the special provision contained in Clause (d) and subject to any extraordinary vacancy occurring in the meantime, the members of the Board remained in office until the first Wednesday in May in the year 1931. But for the existence of Section 6 (d) the position of members of the first Board was quite clear. Once elected at a special meeting of the Council their position appeared to be identical with that of members of a Board who would be elected at the general election of members of the Board on the first Wednesday in May, 1931, subject to the qualification that the term of office was not the same and the first Board might be reconstructed under Section 6 (d); but it was plainly the intention of the Legislature that the first Board should be the creation of the constituent local authorities and not of the electors. If, as Mr. Northcroft claimed, the places of the six deposed members were to be filled by the electors, then the principle of appointment by the local authorities was violated.

At any time between the first Wednesday in May, 1929, and 31st May, 1929, the Council might step in and remove a member or members. It could remove one member on one day and another on another day or it could remove all the members on one day. Excepting in the case of an extraordinary vacancy, that right to interfere with the composition of the Board was the peculiar prerogative of the local authority. No one else was authorised to exercise that power and it could be exercised during a limited period only. If the Council removed members His Honour thought that it was obliged to fill up the gaps in the ranks. Apart from the provision contained in Subsection (d) no machinery appeared to exist which would enable a local authority or electors to fill up a vacancy caused by removal under that subsection. The act performed by the local authority under Section 6 was not, in His Honour's opinion, an "election" within the meaning of the Local Elections and Polls Act, 1925. His Honour must assume that the Legislature intended that the full complement should be maintained, so, if a removal was made but no fresh appointment followed, the removal had no effect. Paragraphs (a), (b) and (c) of Section 6 of the Act created a definite obligation. Those provisions were mandatory. A duty was imposed upon the local bodies from which they could not escape. The local bodies were bound to set about constituting the first Board in the manner prescribed by the Act, and when they set about changing the personnel of the Board under paragraph (d) they could not stop halfway but must complete the operation. In an attempt to interpret Subsection (d) of the statute, the main purpose of the provision must not be lost sight of. The Legislature obviously intended to give to newly-elected members of a local authority commencing their career on the first Wednesday in May, 1929, a power to review appointments made by their predecessors in office and to substitute other members for those holding office. They were authorised to effect a substitution. The expression "substitutionary appointment" was used in the subsection. They were not, His Honour thought, authorised to remove a member only. Once the process of substitution was commenced it was necessary to complete it by appointing another member in place of the one removed. If that operation was not completed no substitution was effected and matters accordingly remained in *statu quo*. The right to remove and the right to appoint "another or others" were interlocked. If one right was exercised the other must also be exercised and if both were not exercised, if, for instance, the act of removal alone was performed, that act was nugatory. That was precisely the result of the proceedings on 28th and 30th May. The members of the Council elected in May were given an opportunity of considering the appointments previously made. They set to work to effect a substitution by removing existing members, then an effort was made to elect new members but that attempt failed, some gentlemen declining to become candidates. No new substitutes were appointed so no substitution was effected. Finally the old members were again

appointed and in the final result the appointment of the old members was confirmed. The word "substitute" meant "to put in place of another." Here, no new member was put in the place of an old member so the act of substitution which the local authority was required to perform was never consummated and the original appointments therefore stood. Viewing the whole of the proceedings of the Council on 28th and 30th May from beginning to end, His Honour came to the conclusion that the proceedings of the Council were incomplete and ineffective. One resolution neutralised the other. An attempt was made to effect a substitution but it failed, so the original appointments stood. His Honour referred to the principle stated by Lord Shaw in **Shannon Realties v. St. Michel,** (1924) A.C. 185, 192, that where alternative constructions were equally open, that alternative was to be chosen which would be consistent with the smooth working of the system which the statute purported to be regulating, and added that the construction he had put upon the statute seemed consonant with the intention of the Legislature. His Honour was disposed to think that the language of the subsection denoted that the identity of the members must be changed if any change at all be attempted under the statute.

Mr. Northcroft also claimed that the notice calling the special meeting to consider the removal of members of the Board should have informed members that new appointments were to be made. It seemed to His Honour, that in view of his decision upon the other question raised, it was unnecessary to consider whether what was done at the meeting on 30th May was or was not irregular. In **Major v. Tauranga County,** 7 N.Z.L.R. 121, and in **Thomson v. Stevenson,** (1916) N.Z.L.R. 963, the validity of special orders was in issue and in each case the validity of the special order plainly depended upon the efficiency of a notice calling a special meeting.

It remained for His Honour still to consider two submissions made on behalf of the defendants: first, that in a proceeding of the present kind the Attorney-General should have been joined, and, second, that the Supreme Court had no jurisdiction to entertain the application. His Honour had no doubt that if the Court had jurisdiction to hear the case the Attorney-General should have been a party in the action. The plaintiffs were electors within the meaning of the Auckland Transport Board Act, 1928. The basis of their claim was that the defendants having been removed from office on 28th May, 1929, had since then continued to act as members of the Board. It was claimed that the general body of electors as defined by the statute had a right to elect members of the Board as successors to the defendants, and that that right had been and was being infringed. Inasmuch, therefore, as the matter in issue was whether there had been an interference with a public right, His Honour thought that the Attorney-General should have been joined in the proceedings. His Honour knew of two instances in which in respect of an interference with a public right a plaintiff could sue without joining the Attorney-General. They were stated by Buckley, J., in **Boyce v. Paddington Borough Council,** (1903) 1 Ch. 109, 114, as, first, where the interference with the public right was such as that some private right of his was at the same time interfered with, and, secondly, where the plaintiff in respect of his public right suffered special damage peculiar to himself from the interference with the public right. In the present case no private right of the plaintiffs had been interfered with and no special damage peculiar to themselves had been suffered by any one of them. If there had been any unlawful interference at all it was an interference with statutory rights which electors in a large district had had conferred upon them. It was claimed that certain gentlemen were perpetrating a public wrong in that they were taking part in the management of a large public undertaking without lawful authority. The non-joinder of the Attorney-General could, however, be got over. If there were any need for it His Honour would make such an order as would bring him in either as plaintiff or defendant in the present proceedings. But, as His Honour was prepared to decide that the defendants were holding office in accordance with law, it was unnecessary to take any step to bring the Attorney-General into the litigation.

His Honour next proceeded to consider whether the old remedy of *quo warranto* had been taken away by Section 14 of the Auckland Transport Board Act, 1928, which provided that a Magistrate's Court might issue a summons calling upon a member of the Board to show cause why he should not be adjudged to be ousted from office upon proof that he was or had become incapable under the Act of holding his office. His Honour referred to Subsection (5) of that Section, and said that the Section assumed that a person had been elected or appointed to an office and that some form of incapacity existed which disabled him from acting as a member of the Board. He might have ceased to be an elector or he might be of unsound mind or he might have become bankrupt or he might be disqualified for other reasons. Section 10 provided a list of instances in which a person should be incapable of being elected to be a member of the Board, but except in the case of a person who was not an elector the Section did not provide that a person should be incapable of being a member of a Board. Nevertheless the logical consequence of disqualification for election seemed to be incapacity for holding office. In the present case the ground relied upon against the defendants was that, under paragraph (d) of Section 6 of the Act, they had become incapable of holding office because, having been removed therefrom, the members of the City Council, for the purpose of replacing them, were obliged to select "another or other" electors. Notwithstanding that they continued to be electors and could submit themselves for election if an extraordinary vacancy occurred, it was said that when the Council came to make appointments under the special provisions contained in paragraph (d) the door was shut against the defendants; they were incapable of being appointed under paragraph (d) and were incapable under the Act of holding office. Reluctant as His Honour was to decide that the jurisdiction of the Court in a matter of that kind had been taken away, His Honour had been unable to discover any sound reason for deciding that the remedy against a person who was or had become incapable of holding an office was restricted to the cases enumerated in Section 10. The words of the Section were "is or has become incapable under this Act." If the Auckland City Council was bound to elect another or other electors not being the electors removed from office, then there appeared to be no doubt but that the question to be decided was whether the defendants had become incapable under that Act of holding office, and Section 14 stated that such a question should not be tried in the Supreme Court. Although His Honour had been unable to discover that in England there existed a provision precisely identical with Section 14 of the Auckland Transport Board Act, 1928, the Municipal Corporations Act, 1882 (Eng.) in principle bore some kind of resemblance to it and was reviewed in **Rex v. Beer,** (1903), 2 K.B. 693. There the Court had to determine to what extent the remedy by *quo warranto* had been taken away by Section 87 of that statute, but it did not assist to a decision in the present case. After giving all the facts and the legislation due consideration His Honour found it impossible to avoid the conclusion that the one and only question for determination in the present action was whether each of the defendants was or had become incapable of holding his office under the statute, and as the language of the Section was plain His Honour had no other alternative but to decide that the Magistrate's Court was the tribunal in which the matter should be determined.

Judgment for defendants.

Solicitors for plaintiff: **Earl, Kent, Massey and Northcroft,** Auckland.

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

MacGregor, J. October 16; 25, 1929. Wellington.

ROXBURGH v. ROXBURGH.

Divorce—Maintenance—Petition for Divorce on Ground of Separation for More Than Three Years Under Agreement—Failure by Petitioner to Pay Maintenance Under Agreement—Failure Not "Wilful and Persistent" but Due to Poverty—Decree Nisi Granted and Not Withheld Until Agreement Reached Between Parties as to Payment of Arrears of Maintenance and Future Maintenance—Decree Not to be Made Absolute Until Order Made for Permanent Maintenance of Respondent and Child—Divorce and Matrimonial Causes Act, 1928, S. 33.

Petition by husband for divorce on the ground of separation for more than three years under an agreement in writing. The petitioner's case was proved at the hearing, but it was also proved that the petitioner had for some time past, owing to poverty, failed to pay to the respondent the maintenance to which she was entitled under the separation agreement.

Ongley for petitioner.

O. C. Mazengarb for respondent.

MACGREGOR, J., said that from the evidence it did not appear that the petitioner had failed to pay the maintenance "wilfully and persistently"—see **Mason v. Mason,** (1921) N.Z.L.R. 955, 963—but rather that his failure to pay was caused

by his poverty. In those circumstances counsel for the respondent while admitting that the petitioner was entitled to a decree for divorce, contended that the decree *nisi* should not be actually pronounced until the petitioner had come to an agreement with the respondent regarding the arrears of past maintenance and the payment of future maintenance. In support of that contention he cited the cases of **Lodder v. Lodder,** (1921) N.Z.L.R. 876, 881, and **Irvine v. Irvine,** (1922) G.L.R. 194, 196. His Honour had considered those cases carefully, but he doubted whether they should be followed as suggested in the circumstances of the present case. Neither of the cases cited dealt with arrears of maintenance. In both of them the husband was a man of some means. In the present case he was a poor man, earning a precarious livelihood as a waterside worker. From the evidence as elicited at the hearing, His Honour doubted whether the parties could, owing to their irreconcilable attitude, come to any mutual agreement on the vexed question of maintenance. That question should, His Honour thought, be left to the Court to determine under Section 33 (2) of the Divorce Act. The appropriate time to apply for permanent maintenance was, on the application to make the decree absolute, and His Honour thought that course should be adopted in the present case. If the parties could agree on the amount to be paid, a separate petition need not be filed, and the order for maintenance might be included in the decree absolute: **Robertson v. Robertson,** (1922) G.L.R. 62. If not, the Court itself would have to fix the amount. As to the maintenance due under the deed, see **Reid v. Reid,** (1926) P.1.

His Honour thought, however, that the decree *nisi* should not be made absolute unless and until an order had been made providing for the permanent maintenance of the respondent and her child under Section 33 (2): see **Jardine v. Jardine,** 6 P.D. 213; **Edwards v. Edwards,** (1894) P. 33; and **Parry v. Parry,** (1896) P. 37. The amount of the weekly or monthly payment so to be ordered could not now be fixed, as it must depend to some extent upon the financial position of the parties respectively at the time of the motion for a decree absolute. Decree *nisi* granted, to be moved absolute after the expiration of three calendar months. *Interim* custody of the infant child of the marriage given to the respondent. This decree *nisi* not to be made absolute unless and until an order for the permanent maintenance of the respondent and her child made by the Court.

Solicitors for petitioner: **Ongley and O'Donovan,** Wellington.
Solicitors for respondent: **Mazengarb, Hay and Macalister,** Wellington.

Blair, J. October 10, 18, 1929.
Wellington.

HINDMARSH v. GUTHRIE.

Negligence—Collision—Motor-vehicle—Respondent's Car Rounding "Blind" Corner on Approach to Bridge on Wrong Side of Road—Appellant's Car Approaching Corner from Opposite Direction on Correct Side of Bridge—Sudden Emergency—Appellant Swerving to Wrong Side of Road to Avoid Collision—Respondent Swerving to Correct Side—Collision—Respondent Negligent—Act of Appellant in Sudden Emergency Created by Respondent Not Amounting to Negligence.

Two appeals, one by Hindmarsh, the driver of a motor car, and the other by the Shell Co. of New Zealand Ltd., the owner of such car, against the decision of a Stipendiary Magistrate at Wellington, holding that a collision near the new Hutt Bridge with a motor car driven by the respondent was due to the negligence of Hindmarsh and that Hindmarsh and the Company were liable in damages to the respondent in respect of such collision. The appeals were by consent heard together. It appeared that the appellant, Hindmarsh, was at about 1 a.m. on the night of 2nd May, 1929, driving across the new Hutt Bridge. He was proceeding at a speed of about 15 miles per hour on his correct side of the bridge, his near wheel being about six feet from the near side curb, and was about 45 feet from the Hutt end of the Bridge when the lights of the respondent's car suddenly appeared at the Hutt end of the bridge. The respondent had driven along the main Hutt Road which meets the bridge at virtually a right angle, and instead of approaching the bridge on a wide sweep so as to enter it on his proper side, the Magistrate found that the respondent cut the corner. The bridge had concrete sides which would obscure the view of the respondent, and the lights on the bridge itself had the effect of negativing the shine of approaching lights. Respondent's speed was 15 miles per hour. The appellant's marks on the bridge showed that he proceeded for possibly 5 feet on his original course and then swerved to his right, thus bringing himself on to the wrong side. It was estimated that he made his decision to get out of the way of the respondent's approaching car within a quarter of a second. The respondent himself simultaneously veered over to his proper side and his car struck and broke the wooden edging of the footpath, actually coming to a stop on the footpath on his proper side of the bridge. A collision took place and both cars were damaged—neither of them very severely. The Magistrate found that the respondent approached the bridge on the wrong side, but further found that appellant should, instead of swerving over to his wrong side, have remained on his proper side and applied his brakes. The Magistrate considered also that the appellant had the last opportunity of avoiding the accident, and that the appellant was not justified in assuming that respondent might not go to his proper side. The appellant in evidence said that his first indication of respondent's approach was the lights of a car badly cutting the corner, and that he thought that to avoid a head-on collision his only course was to get out of the way and so he drove to the other side of the road.

Keesing for appellants.

Leicester for respondent.

BLAIR, J., after observing that a motor car travels in feet per second one and a-half times the figure for its speed in miles per hour and that the two cars approaching each other at the rate of 15 miles per hour would each be travelling at the rate of 22½ feet per second and would, therefore, use up the 45 feet separating them in one second, said that the Magistrate, on the facts as he had found them, had misconceived their legal effect. The corner of the bridge was what was known to drivers as a "blind corner" inasmuch as one could not see round it. Any driver of a car who drove round such a corner on his wrong side was taking a most grave risk. He would not dream of taking such a risk if he knew that a vehicle were approaching round the corner on its correct side, and it followed that if he did not know whether there was a vehicle there or not, he should assume that there was a vehicle there, and be most careful to approach a blind corner well on his proper side. A driver disregarding such a natural precaution was a danger to traffic. The Lord President in **Barty v. Harper and Sons,** (1922) S.C. 67, 69, when dealing with a submission that traffic in the absence of other traffic had the right of occupying any part of the roadway said: "But it is going too far to appeal to that general principle in support of the pursuer's conduct while rounding a blind and dangerous corner, especially in view of the conditions of modern rapid traffic." The respondent, on the Magistrate's finding, deliberately disregarded that very obvious and proper driving rule. He cut the corner, and from the point of view of the appellant the position as it appeared to him must have been that he suddenly found himself with two headlights bearing down on him some three lengths away. Appellant could not escape by going further to his left as there was no room. He had to make up his mind what to do in a space of not more than a quarter of a second and he decided, wrongly as it eventuated, to swerve sharply to his wrong side to avoid what he thought was a certain collision. At such moments as those a driver must act instinctively, although as events turned out it did not happen to be the correct instinct, for the simple reason that respondent's instincts led him to the same spot. The crisis was created by the respondent's gross neglect of a rudimentary driving rule. It was the right and in fact the duty of a driver on his proper side of the road to go to his wrong side if by so doing he could avoid an accident. There was, therefore, nothing improper in the appellant, in the stress of the moment caused by the respondent's improper action, electing to go to his wrong side. In His Honour's opinion the fact that the appellant did so was under the circumstances no evidence of negligence against him. The collision must have taken place within one and a-half seconds from the moment when the two vehicles first sighted each other, and appellant having made one decision it was not possible to alter it. It was clear, therefore, that on the Magistrate's finding of the facts respondent was wholly to blame. The rule was well established that a wrong manoeuvre made under stress of danger created by another could not be availed of by the other as evidence of negligence. Where a person was suddenly put in a position of imminent personal danger by the wrongful act of another, it was sufficient if he showed as much judgment and self-control in attempting to avoid that danger as might reasonably be expected of him in the circumstances. **The Bywell Castle,** 4 P.D. 219; **U.S. Shipping Board v. Baird Line,** (1924) A.C. 286; **Wallace v. Bergius,** (1915) S.C. 205. His Honour distinguished **Barty v. Harper and Sons,** (1922) S.C. 67, which was strongly relied upon by the respondent,

on the ground that the circumstances of that case clearly brought it outside the rule in **The Bywell Castle** (*cit. sup.*) as the defendant had there attempted a highly dangerous manoeuvre quite unnecessarily and without the slightest suggestion of stress of peril.

Appeal allowed in both cases.

Solicitors for appellants: **Barnett and Keesing,** Wellington.
Solicitors for respondent: **Leicester, Jowett, and Rainey,** Wellington.

Smith, J. September 27; October 4, 1929. Auckland.

IN RE ALLAN.

Bankruptcy—Creditor's Petition for Adjudication—Arrangement by Debtor with Creditors—Petitioning Creditor Not Party to Arrangement—Evidence Insufficient to Justify Court in Dismissing Petition on Ground of Debtor Having No Assets—Conduct of Petitioning Creditor Not Amounting to Abuse of Procedure of Court in Bankruptcy—Arrangement with Creditors Not *per se* "Sufficient Cause" for Dismissing Petition—Bankruptcy Act, 1908, Section 37 (3).

Petition by Commercial Loan and Finance Co. Ltd. to have one Allan adjudged bankrupt for failure to comply with the terms of a bankruptcy notice. In October, 1928, the petitioning creditor which had a security over all the debtor's chattels to secure its debt, seized and sold the chattels, realising about £14. On 2nd December, 1928, the debtor made a proposal to his creditors to pay the sum of £2 per week out of his wages for distribution among them *pro rata*. This proposal was apparently not communicated to the petitioning creditor. The arrangement was carried out by the debtor and a dividend of 4/6 in the £ was paid to all the creditors, save the petitioning creditor. It was said that a dividend of 4/6 in the £ was being held in suspense for the petitioning creditor, pending the result of these proceedings. On 13th December, 1928, the petitioning creditor obtained judgment for £35 10s. 6d., the balance due to it under its security. The solicitors for the petitioning creditor were apparently aware by 4th July, 1929, that some arrangement existed between the debtor and his other creditors, for on that day they telephoned the solicitor for the debtor, and insisted on payment to them, on behalf of the petitioning creditor, of a dividend, and threatened bankruptcy proceedings if the payment was not forthcoming. At that time, no dividend had been paid to the other creditors. The debtor's solicitor replied that the funds in hand did not warrant a dividend of 4/- in the £, and that owing to the number of small creditors, it was unfair to expect cheques to be sent out for a smaller dividend, but he said that he expected to be able to pay a dividend within two or three months. The petitioner's solicitors then asked for a dividend in advance of the other creditors, on the ground that the petitioning creditor's debt was the largest. The debtor's solicitor refused this, as it would have been in conflict with the arrangement with the general body of creditors. The manager of the petitioner company was dissatisfied with his solicitors and consulted another solicitor who, without further communication with the debtor or his solicitor, issued a bankruptcy notice to the debtor on 16th July, and served it on 17th July. The creditor's petition was filed on 9th September. Ten days' notice of a meeting of creditors to be held on 24th September was sent by the debtor's solicitor to all the creditors, including the petitioning creditor. That meeting was held, and was attended by certain small creditors, but was not attended by the petitioning creditor. The creditors present at that meeting passed a resolution expressing entire satisfaction with the arrangements made by the debtor for payment of his liabilities and unanimously concurring that it was not in the interests of the debtor or of his creditors that he should be adjudicated a bankrupt. Many of the small creditors also signed a certificate to that effect. It was on affidavit that the creditors at the meeting were satisfied that there were no assets available for distribution among the creditors, if an order of adjudication should be made against the debtor.

McLiver for petitioning creditor.
Newberry for debtor to oppose.
Lennard for other creditors to oppose.

SMITH, J., said that the granting of the petition was opposed on two grounds: (1) that the debtor had no assets, and (2) that the petitioning creditor had been guilty of an abuse of the procedure of the Court in Bankruptcy. As to the first ground, the law was stated by Lord Esher, in **In re Betts,** (1897) 1 Q.B. 50, 52, as follows: "If the Court is clearly convinced, not merely by the statement of the debtor, but from all the circumstances of the case, that there cannot be any assets, or any prospect of any coming into existence, and that if a receiving order is made, the only effect will be a mere waste of money in costs, then in such a case the Court has a discretion in the matter, and will be justified in exercising that discretion by refusing to make the order." The evidence in the present case showed that all of the debtor's available chattels in October of last year were sold by the petitioning creditor, but that since then the debtor had bought a motor car. An explanation was made at the Bar that such car did not belong to the debtor, but there was nothing in evidence to show the circumstances. As to landed property, the only evidence was the general statement on affidavit that the creditors present at the meeting were satisfied that there were no assets of any description available for distribution. In His Honour's opinion, the case made against the petitioning creditor on that ground was not sufficiently strong to justify the refusal of an order. In **In re Betts** (*cit. sup.*) where an order was refused, the debtor had not obtained his discharge from a previous bankruptcy, and so the Court was convinced from all the circumstances of the case that there were no assets which would be available in a second bankruptcy. The present case fell far short of that.

As to the second ground, it was shown that on 4th July, 1929, the petitioner's then solicitors asked Mr. Newberry for payment of a dividend, and in default threatened bankruptcy proceedings. The manager of the petitioner company denied positively that he authorised his solicitors' action in threatening bankruptcy proceedings. Even if the solicitors' action were binding upon the petitioning creditor, His Honour was of opinion that such a threat did not constitute sufficient cause against the making of an order of adjudication. All that was asked was the payment of a dividend from the debtor's fund, a fund which did not appear to have been actively brought to the knowledge of the petitioning creditor. The debtor's solicitor declined to pay, upon the ground that there was not sufficient in hand to pay a dividend of 4/- in the £, and that owing to the number of small creditors it was unfair to expect cheques to be sent for dividends of a smaller amount. The next request of the solicitors for a dividend was for payment of a dividend in advance of the other creditors, on the ground that the petitioning company was the largest creditor. That was refused because such a payment would have been in breach of the arrangement with the general body of creditors. That reason seemed to have been accepted by the petitioner's solicitors and the request was not pressed, and no threat of bankruptcy proceedings as an alternative to such preferential payment was made. It was not shown, moreover, that the request for preferential payment was made with the authority of the petitioning creditor. The petitioning creditor, having changed its solicitor, caused the bankruptcy notice to be served on 17th July without further communication with the debtor or his solicitor. The suggestion made to the Court on behalf of the debtor was that the former solicitors must have told the petitioning creditor that the attitude of the debtor's solicitor was reasonable, that they declined to issue a bankruptcy notice in an endeavour to extort a preferential payment from the other creditors, and that the petitioning creditor employed another solicitor to effect its purpose. There was no evidence to support that suggestion. Upon a consideration of the evidence His Honour's view was that the petitioning creditor was not properly advised, from the beginning, of the position between the debtor and the other creditors. The petitioning creditor did not appear, on the evidence, to have been invited to enter into the debtor's arrangement with the small creditors. It was significant that it was not until after the creditor's petition had been filed that the petitioning creditor was invited to attend a meeting of creditors. The petitioning creditor was entitled, if he thought fit, to disregard that notice and to proceed with its legal remedies. The *bona fides* of the petitioning creditor was also to be judged by the fact that the manager had heard that the debtor had bought a motor car. He would naturally wish that position investigated. On the evidence, His Honour was not justified in assuming more than that the petitioning creditor's manager disagreed with his former solicitors either as to their past conduct of his case, or as to their advice as to future action, or both. After a consideration of all the circumstances, His Honour held that it had not been proved that the petitioning creditor used threats of bankruptcy for the purposes of extortion, or that the petitioning creditor pretended to come in to any arrangement between the debtor and his creditors and then seek some secret advantage—**In re Sunderland,** (1911) 2 K.B. 658, 663—or that the petitioning creditor demanded a preferential payment as the price of consenting to the arrangement between the debtor and his creditors, as in **Re Shaw,** 83 L.T. 754, and **Re a Debtor,** 91 L.T. 664. The

mere fact that the debtor had entered into an arrangement with his creditors (to which the petitioning creditor had not assented) was not, however beneficial to the creditors, "sufficient cause" for dismissing the petition—**Ex parte Oram, in re Watson,** 15 Q.B.D. 399. The present case was to be distinguished from a petition founded on an assignment of property to a trustee for the benefit of the creditors in respect of which the provisions of Section 37 (3) of the Bankruptcy Act, 1908, would apply.

Order for adjudication made.

Solicitor for petitioning creditor: **F. D. McLiver,** Auckland.
Solicitor for various other creditors: **C. G. Lennard,** Auckland.
Solicitor for debtor: **F. J. Newberry,** Auckland.

Smith, J. October 11: 15, 1929.
Auckland.

WILSON v. MORRIS.

Divorce—Permanent Maintenance—Destitute Persons—Registration in Magistrates' Court of Supreme Court's Order for Permanent Maintenance—No Jurisdiction in Magistrates' Court to Vary Order or Cancel Arrears Due Under Order—Destitute Persons Act, 1910, Ss. 39, 61; Amendment Act, 1926, S. 8—Divorce and Matrimonial Causes Act, 1928, S. 41.

Motion for a writ of mandamus against the Stipendiary Magistrate at Whangarei, to compel him to hear and determine a complaint made by the plaintiff. The facts were that on 3rd April, 1928, the Supreme Court at Wellington made an order, in divorce proceedings between the plaintiff and his former wife, for the payment by the plaintiff to her of £1 per week for her maintenance. The order was pursuant to Section 8 of the Destitute Persons Amendment Act, 1926, registered in the Magistrates' Court at Wellington on 5th April, 1928. On 11th September, 1929, the plaintiff filed his complaint in the Magistrates' Court at Whangarei, praying for a cancellation of the arrears payable under the maintenance order, and for a variation of the order. Mrs. Wilson objected to the jurisdiction of the Magistrates' Court to vary the order, or to remit arrears; the Magistrate upheld the objection.

Crimp for plaintiff.
Hubble for Mrs. Wilson.

SMITH, J., said that it appeared that some Magistrates had held that they had jurisdiction to vary Supreme Court orders registered in the Magistrates' Court pursuant to Section 8 of the Amendment Act of 1926, while others had held that they had not. His Honour read the provisions of the Section and said that, as he himself had pointed out in **Maxwell v. Maxwell,** (1929) N.Z.L.R. 44, the authority of the Magistrate to proceed and exercise his penal jurisdiction depended upon the registered copy of the order under the seal of the Supreme Court. His jurisdiction continued "so long as such order continues in force." On principle, then, a Magistrate could not entertain any application to cancel or vary that order; for any cancellation or variation of the order would *ipso facto* oust his jurisdiction. Counsel for the plaintiff relied on the words "and all proceedings may be taken thereon," as constituting an authority to the Magistrate to cancel or vary the order. But, in the first place, those proceedings, whatever they might be, could only be taken so long as the order continued in force. In the second place, the word "thereon" showed that the proceedings (whatever they might be) were to be taken on the registered order. They were proceedings "on" the order, and not against it. The proceedings, therefore, would include all proceedings up to fine and imprisonment for wrongful default in payment. The object of Section 8 was clearly, in His Honour's opinion, to provide a summary remedy for the enforcement of the order. There was only one Court for the variation, modification, or suspension of an order for maintenance made by the Supreme Court in divorce proceedings, and that was the Supreme Court itself. Section 41 of the Divorce and Matrimonial Causes Act, 1928, conferred upon the Supreme Court ample power in that respect. It could not be suggested that Section 8 of the Destitute Persons Amendment Act, 1926, ousted the jurisdiction of the Supreme Court to vary its own order. If there were two jurisdictions, obvious difficulties would arise. No hardship was imposed upon any party by holding that the Magistrates' Court could not cancel or vary or remit arrears due under an order for maintenance registered under Section 8. The defendant could always apply to the Supreme Court for a variation of the order for maintenance; and in any event, the defendant was guilty of no offence before the Magistrate by reason of default in payment, unless his failure to pay was "without reasonable cause"; Section 61 of the Destitute Persons Act, 1910.

Motion dismissed.

Solicitors for plaintiff: **Ball and Wilkin,** Auckland, agents for **N. E. Crimp,** Whangarei.
Solicitors for Mrs. Wilson: **Meredith, Hubble and Ward,** Auckland.

Kennedy, J. October 16; 17, 1929.
Dunedin.

CLUTHA DEVELOPMENT LTD. v. BYRNES.

Mining—Application for Special Claim—Claim Opposed—Preliminary Inquiry Before Warden to Ascertain Whether Expenses of Survey Should Be Incurred—Application Adjourned for Survey and Costs Awarded Applicant—Warden's Decision Not Appealable—Not a "Final Order, Judgment or other decision" of Warden—Mining Act, 1926, SSs. 172 (b), 366.

Appeal from the decision of a Warden in respect of an application by the respondent for a special dredging claim which was opposed by the appellant. The application came before the Court on 10th April, 1929, when the Warden held the preliminary inquiry referred to in Section 172 (b) of the Mining Act, 1926, for the purpose of enabling it to be ascertained, as far as practicable, whether the expense of survey should be incurred. The objector was heard and the Warden then, being of opinion that no valid objection appeared to the granting of the application, adjourned the application for survey. The notice of appeal stated that the objector was dissatisfied with the decision of the Warden which was stated in the notice to be as follows: "Application adjourned for survey. Costs £3 3s. 0d. and Court fees allowed to applicant."

Hay for appellant.
F. B. Adams for respondent.

KENNEDY, J., said that on the appeal to the Supreme Court the preliminary objection was taken that the decision appealed against was not a final judgment, order or other decision of the Warden and that no appeal would, therefore, lie from the decision to adjourn for survey and from the incidental award of costs: Mining Act, 1926, Section 366. His Honour was of opinion that such objection was sound. The exact point raised was decided by Sim, J., in **Halliday v. Gibson,** (1922) N.Z.L.R. 879, where it was held that a decision of a Warden, almost identical with the decision appealed from, was not a final decision and, therefore, not appealable. His Honour respectfully agreed with that judgment and with the reasons therefor. If on the holding of the preliminary inquiry under Section 172 (b) of the Mining Act, 1926, the Warden was of opinion that the application should not be granted he might dismiss it. If, however, no valid objection appeared to exist to the granting of the application the survey was to be proceeded with and in the meantime the hearing of the original application was postponed. The application was not dismissed but it was, at that stage, certainly not granted. When, after the survey was completed, the hearing was resumed it would still be open to the objector to urge other grounds why the application should not be granted and the application might then be refused. Until a decision was given, the application was neither granted nor refused. All that the Warden had done prior thereto, was to reject certain reasons urged why the application should be dismissed at the preliminary inquiry. The fact was that the appeal lay not from the reasons given by the Warden when adjourning the further hearing for survey, as the notice of appeal appeared to suggest, but only from the Warden's final order, judgment or other decision. The rejection by the Warden of the grounds urged by the objector for refusing the application at the preliminary inquiry did not finally dispose of the application one way or the other. The decision, therefore, to adjourn till after survey, was not a final decision from which an appeal would lie.

Appeal dismissed.

Solicitors for appellant: **Brodrick and Parcell,** Cromwell.
Solicitors for respondent: **Bodkin and Sunderland,** Alexandra.

"The Profession of the Law."

A Paper Read at the English Law Society's Provincial Meeting.

An admirable little essay on "The Profession of the Law" was read by Mr. F. A. Graham (London) at the Provincial Meeting of the English Law Society, held at Bournemouth at the beginning of last month. As to a few of Mr. Graham's observations it has, of course, to be remembered that in England separation of the two branches of the profession is the invariable rule and not, as in this country, the exception, but nevertheless the whole paper, which we reprint below, is of considerable interest to the New Zealand practitioner.

"As members of a profession, engrossed in its daily tasks and engagements, we seldom turn aside to ask ourselves whether, apart from the fulfilment of the pressing duties of our calling, we have any place in the body politic, or whether in this changing age we carry any weight or influence in shaping it for the common weal. Our annual autumnal gathering, however, may prove to be an opportunity, not otherwise to be found, for such reflection; and if so, it should not be impossible to recognise the unique position which the profession, as a whole, in close touch as it is with men and women of every class, should hold, in guiding and stabilising the streams of thought and action, which have been and are flowing strongly through our country, into channels which may, at least, avoid disappointed hopes and harmful upheavals.

"The mere realisation of the fact that we are members of a profession which has to play its part in steadying and guiding our country in days of change and crisis will, without doubt, tend to influence both our judgment and our advice. Class warfare, from either side, will be deprecated; disputes and difficulties will be viewed and advised on from more than one angle; while imperceptibly a spirit of goodwill and conciliation will both infuse our arguments and qualify our actions. With these opening observations as to our place and usefulness in the nation's life may we go on to consider some aspects of a profession which entails such opportunities and responsibilities.

Its Entrance.

"One of the most striking features of our profession is that it is carried on by persons of varying degrees of qualification. Indeed, in a period like the present, when knowledge is extending on every hand, and the habits and thoughts of men are perceptibly changing under the influence of a post-war outlook, the suitable equipment for the practice of the profession of the law (apart from the revolutionary character of recent legislation in regard to the laws of property and descent) becomes increasingly complicated and involved. No longer can the tendering of advice, based only on observation and experience, suffice; for he who would be wise to-day in the ways of the law will find himself, like unto the searcher after mineral wealth, faced with a succession of strata, in the form of Statutes, ancient and modern, and judicial decisions of varying lucidity, through which he must of necessity drive the shaft of his intelligence before he can obtain the desired result.

"To meet this situation there is the well planned and expanding curriculum of the Society's Law School, the guide and counsellor of the budding lawyer as he passes through the entrance gate of general knowledge into articles of clerkship, before descending, duly qualified, into the arena of his chosen profession. In this purpose of leading our articled clerks by the best and surest road to that intellectual well-being which will constitute their principal capital in professional life, the Society is undoubtedly undertaking the most important of its many tasks; and no profession, perhaps, more amply repays the acquisition of a thorough and at the same time practical, education and training. In proportion to the development of his knowledge will the future practitioner become valuable to himself, and therefore capable of being valuable to others.

"In this connection it may not be out of place to suggest that a power worthy of cultivation, but somewhat neglected in our legal curriculum, is that of *utterance*. Our power over others lies not so much in the amount of knowledge and thought within us as in the ability to utilise and express it. A lack of facility, either to express or adapt ourselves to the various degrees of intellect met with from time to time in the practice of the law is not unknown amongst us; and both in negotiation and in argument many a case has failed to secure a satisfactory presentation through want of suitable words. The addition to the present course of studies of a class for discussion (apart from the well-known and approved debating societies) would probably meet a real need.

Its Continuance.

"Here, it may be noted, that confidence is the soil out of which employment grows, and that good repute has been likened to fire—once kindled it is easily kept alive, but when extinguished not easily lighted again. Our work must largely partake of the character of those who do it; and the tone of our professional character will depend on the estimate which we form of the duties we undertake, and of the spirit which ought to actuate us in carrying them out. For instance, service rendered gives a feeling of satisfaction; but if the service is fulfilled solely in the expectation of reward, the consequent satisfaction is no little dimmed. In the profession of the law there is, it may be said, little or no room for the diffident or retiring nature—distrustful of his own abilities he is unlikely to do justice to his client's cause. At the same time success in the profession is seldom given to him whose chief asset is self-confidence and assurance, and who, while active in the protection of his client's interest, is not careful as to the means used to attain the sought-for end.

"To say that scrupulous exactitude in money matters and the strictest integrity in handling the property of others is required in the profession of the law is to state that which is the basis of the confidence we seek to win; while the neglect of suitable care and attention will undoubtedly lead, sooner or later, to difficulties and confusion. The periodical visit of the auditor, if not essential, is certainly most expedient in the practice of the law.

"In the profession of the law an intelligent thrift of time is of the utmost importance to the busy man; and order and proportion in our work will be found to be the true secret of the smooth working of the office machine. A certain degree of latitude in regard to working hours may be necessary from time to time;

but to seek to stretch such latitude beyond reasonable limits will be found to be harmful and unwise. While intelligence and energy may be stimulated by pressure from without, yet any beneficial effect may quickly be lost if the pressure becomes too great.

"Let the younger practitioner have no fear as to the future. The high places of the profession, few though they be, may be reached with the exercise of quite ordinary qualifications, and in the profession of the law application and attention are seldom left without reward.

ITS DRAWBACKS.

"Not for us that self-determination, which to-day is claimed not only by the younger nations of the world, but also by the younger professions. At will they may fix and adopt a scale of remuneration, adequate or otherwise, for their services; while the legal profession remains tied and bound by Statutes and Rules, with resultant fees that at times look strangely meagre in the light of those which have to be paid elsewhere. Not for us (with few exceptions) government appointments to official positions. That the *solicitor* to be appointed must needs be a *barrister* is, alas, one of the paradoxes of the legal world. Not for us the addition of alphabetical lettering to our names, for the purpose of illuminating our professional standing, as the manner of some is. Not for us the creation of legal literature on the varied branches of the law—for, after the daily demands of our professional life have been met, there is neither time nor strength for authorship. Whilst *originality*, a valued element in most human affairs, finds little or no scope in the practice of the law.

ITS GUARDIAN.

"It is of moment that members of the profession should not only properly estimate the immense value of the Law Society to our collective and individual well-being, but also take an active interest in its welfare and extension—joint counsels and efforts are ever needful wherewith to meet common dangers and difficulties. The advantages secured to the profession by the united action of our Society have been many; and it is surely true wisdom to rely, for the preservation and extension of those advantages, on the body by which they have been secured. The Law Society, therefore, has a just claim on our whole-hearted confidence and support; but to its continued maintenance and efficiency the loyalty and help of *all* members of the profession becomes more and more indispensable.

"It is certainly probable that the two branches of our profession in this country will continue to remain apart; but the spirit underlying both must be one and the same; ever seeking to exert its influence in upholding that freedom and justice, amongst all classes of the community, for which as a nation we are justly proud. To this end a joint school of law in the days to come would surely not be unwelcome to all concerned.

CONCLUSION.

"A profession which has proved so useful cannot escape occasional misunderstandings and abuse; but if we are in earnest in seeking to promote a growing spirit of fellowship and co-operation in the service of our profession, we shall be able, in the future, as in the past, safely to weather any storms that blow. That in a sense we belong not so much to our selves as to our profession is, perhaps, hardly as yet fully realised; else surely the obligation, under which poor persons may now command our service to enforce their rights and redress their wrongs, would be more definitely acknowledged by the profession as a whole, and not left to a minority to undertake and fulfil. The day, however, must assuredly come when the whole profession will be genuinely proud of its Poor Persons Procedure.

"To recapitulate, while the services of our profession are indispensable to the well-being of the nation, a responsibility, which cannot be evaded, rests upon us, both individually and collectively, as to the manner in which those services are discharged. In days, therefore, when movements leading to agitation and upheaval may, from time to time, menace our Constitution, there should surely come to the profession of the law a quickened sense of corporate responsibility, a stronger emphasis on right ideals and practical reforms, as well as a close adherence to those indispensable high standards of conduct and practice which are our conscious heritage from the past—thus, and thereby, taking a definite part in rightly directing the forces of this changing age, as well as fulfilling the responsibilities which rest upon the profession as an integral part of the national life."

Tendencies in Legislation.

Views of Mr. Justice Eve.

At the banquet held in connection with the Law Society's recent Provincial Meeting at Bournemouth, Mr. Justice Eve voiced some more strictures upon modern legislation. "Another tendency in your legislation," he said, "due it may be to the aftermath of the war, is the tendency on the part of the executive to restrict the personal freedom of the individual, to intermeddle with, and at times to compete with, the individual comfort, and occasionally, not infrequently, to transgress the line which should clearly, and which does clearly, demark the functions of the executive and those of the magistracy. And is there no doubt that these tendencies to restrict the individual freedom, to discourage individual effort, self-denial and thrift, to assume responsibility on the part of the State which ought to be discharged by individuals, and to restrict the rights of the citizen to have his disputes adjusted and his position ascertained by the ordinary courts of law, good intentioned as they may be but hopelessly illusive as they are, are destructive of the moral fibre and the national characteristics of those who would set up a new state wherein the legitimate rewards and emoluments of those who have toiled and saved should be the first fund available for the support, the maintenance, the fecundity and the indolence of those who have never done anything?"

The Firm's Letterheads.

In the Westminster County Court a barrister was strenuously contending that a firm was liable because all the correspondence conducted by a member of the firm was written on the letter-paper of the firm.

Judge Turner: "A man might write love letters on his firm's notepaper, but that would not make the firm liable for breach of promise of marriage."

London Letter.

Temple, London,
12th September, 1929.

My dear N.Z.,

The death of Lord Mersey is, apart from the grief it involves for his personal friends and companions, an appreciable loss from our stock of strong personality, which is less ample in these than in past days. The gentle art of compromise tends, in our generation, to eliminate the less accommodating gift of strength; and, without for a moment suggesting that there was any lack of humanity or sweet reasonableness in Lord Mersey, since those who knew him more nearly and had occasion to observe him, when these qualities were called for, speak no less highly of him than do others, it is upon a Judge of strength and at times positively terrifying strength that the memory lingers, so far as concerns practising barristers of the day. There is no denying that, as fledglings at the Bar, we trembled upon learning that he was going the circuit; and, when it came to the ordeal itself, we wished to goodness we might change places with our client so that we might enjoy the security of the dock and he be left to do the arguing. It was said, and I do not know with what truth, that he deliberately emulated Hawkins, J., of terrific memory; and I know that many a man of my year resented the observations of the older hands that we lived in easy times now that there was no Hawkins, J., to confront. This, when there was Bigham, J., to deal with. I should add, if I wrote according to precedent, that his severity was always accompanied by unswerving justice, his ferocity tempered by an underlying geniality. They may have been: I was never sufficiently in possession of my faculties to judge: I felt like the unfortunate running for his life, with no other idea than to arrive at the gate of the field ahead of the bull behind. A splendid bull? A perfect bull? A bull animated only by the kindest of natures and the most congenial of motives, when you stopped running and got to know it? May be: all I ever knew was the fervour of my own inward prayer that heaven, or my own address, would get me over the gate and out of harm's way before I had any opportunity whatever of estimating, by experience, its characteristics and disposition. Our great soldier, Field Marshal Allenby was also, and perhaps still is, known among his intimates as "the Bull," and I think I am not detracting but adding to a great memory, when I extend the title to Lord Mersey, as he was at any rate in the days when he and I used, in the course of our several professions, to "have words."

One other personal memory of that past, a quarter of a century ago and more, is appropriate. Bigham, J., was also distinguished, as amongst us smaller and less reverent fry, by the overwhelming distinction of his famous clerk. It used to be a recognised initiation to the lighter side of the law, for the new recruit, bent upon learning either as solicitor or as barrister the workings of the Courts, to be taken round and introduced to Mr. D . . . ., by far the best dressed man within the precincts of Justice and by no means the least interesting. He is the father of those two renowned and charming actresses, often known as the Misses Dare, a fact which used to add a further thrill to the almost surreptitious visits of the law student to the chambers of Mr. Bigham.

The Lord Chief's book, on the beastliness of bureaucracy, is now appearing in the *Daily Telegraph*, and we need have no fears that there will be any lack of ferocity, and deadly ferocity at that. But yet, somehow, if I was a bureaucrat I should not be terribly afraid. Either these bulls are not what they were, or else I have got thick-skinned and hard-seated, and am no longer a judge of the species. No, I stick to what I have always said, and what every generation has said before mine, and what every generation will say after it: we are a softer race of men than we used to be.

We are still on Vacation, and little is doing or being discussed, except, perhaps, the never-ending and no-nearer-a-conclusion-than-ever discussion as to motorists and the law. You no doubt know that we still suffer under a universal speed limit of twenty miles an hour, maximum, here, the exact nature of our suffering being that there is, in actual administration, no speed limit at all and, what is worse, no rule of law enforcing reduction of speed where progress should be particularly cautious. I mean this, that the anachronism of the 20 m.p.h. not only achieves no good but it achieves much harm in that it excludes speed rules which could be practical and would be enforced. We have had an interesting case, locally, on motor matters, which deserves and is about, I hope, to get a wider publicity than the merely local. There has come into existence, and you may have it too, a system of dividing roads into halves (one half for each direction of traffic) at blind corners and danger spots, generally. It has never been anywhere announced, so far as I am aware, what the white line, painted on the surface of the road, indicates or intends, nor has it ever been authoritatively laid down what is the nature of the line: is it a rule of law, an estoppel, or just a suggestion? At such a blind corner, a "road-hog" overtook a law-abiding car, driven by a lady of principle and determination. The passing began at the beginning of the white line, and ended at the end of it, so that throughout the length of dangerous bend, which was plainly marked as blind and as requiring careful clearance of the off-side of the road, there was being created, by the "road-hog," a definite trap, possibly death-trap, for any car or vehicle approaching on its correct side from the opposite direction. No collision happened only because there was nothing so approaching: but the lady took the view that criminals should not only be pursued upon their achieving injury, but they should be pursued upon their committing the crime: she was up and after the offender forthwith and, upon catching him up, not only roundly rated him for his offence, but also saw to it that he was prosecuted.

It is, as I have previously reminded you, a troublous business, promoting a prosecution in which you yourself have to give evidence; it takes up a lot of time and means much abandoning of your own convenience; and it involves the never too pleasant experience of going into the witness-box and being cross-examined. In this case, the lady manfully saw the business through; and the surprised "road-hog," who presumably supposed he could do what he pleased so long as he avoided killing people and then it would not matter because he would probably be one of his killed himself, found himself fetched miles back from home on a charge of "driving to the danger," and then fined £10, and then having his license suspended for six months, to boot. There is the further pleasant thought that it probably cost him some fifty pounds moreover, in his own and his lawyers' and his witnesses' expenses; and it must

have been a bitterness to him, and no encouragement for other hogs, to hear the lady being warmly praised by the Bench for her good work.

This, I should say, is the beginning of better things. Otherwise matters are so bad, that something must be done about them, by the Law, soon. I suppose it is the same all the world over, though I am beginning to suspect that our high reputation for being law-abiding and the esteem in which we hold ourselves in this regard have their disadvantages and produce a laxity, in this class of criminality, peculiar to our admirable and much-admired selves. The lawless American seemed to me to treat his motor fiends, when I was there, with a much more effective restraint, *a propos* of all which, you will observe in the current (London) *Law Journal*, notes upon civil and criminal liability, as applied to motors and lethal roads, and upon the case, in the current number of the Law Reports, *Grinham v. Davies*, (1929) 2 K.B. 249, which deals with that vague rule forbidding mention of the fact that a defendant in a running-down case is insured. I am not so sure that old ideas are not the best, in this regard; all refinement of argument will never convince me that there is not an inevitable tendency with juries to let themselves go and have a good smack at it, just as soon as they discover an insurance company has to foot the bill. "They can afford to pay . . . ." is a thought too long familiar as a popular thought with juries in one context or another to be thus suddenly exploded. It used to be railway companies, I remember; and when the insurance companies get poor again, as I doubt if they ever will, it will be someone else. Nobody can say it is right, though it is undoubtedly convenient!

Yours ever,

INNER TEMPLAR.

Correspondence.

The Editor,
N.Z. Law Journal.

Sir,

Fees on Affidavits.

Recently a client brought in some papers the purport of which was that he and two co-executors were applying, in Australia, for exemplification of a probate granted to them in this Dominion. Having carefully perused the papers I got the deponent to swear the affidavits, three in number, and I marked the accompanying exhibits. I charged 9/-, being 2/- on each affidavit and 1/- on each exhibit. A few days later my client told me that he had written his sister, his co-executor, to take money with her when she went to go through the same performance and that she had answered that her solicitor had charged nothing.

Now, who is right? Should I have made the charge or not? Is such a charge defensible? If so the charges should be made uniformly or not at, all and for myself I am not prepared to give up my time to these things for nothing.

I am, etc.,

"AFFIDAVIT."

11th November, 1929.

Third Party Insurance.

Compulsory Scheme Desired in England.

We in New Zealand are just beginning to feel the benefits of last year's Act providing for the compulsory insurance by owners of motor-vehicles against third party risks. In England, however, no similar enactment has yet been passed though there has been a good deal of discussion on the subject, especially in legal circles. The following extract from the editorial comment of the *Law Journal* is of considerable interest:—

"The necessity for a system of compulsory insurance by motorists against third party risks has been preached in these columns in season and out of season. We are very glad to find that our views on the subject are increasingly widely shared. The London and Home Counties Traffic Advisory Committee consider it necessary, and so does the Royal Commission on Transport, whose first Report was issued at the beginning of August. *Truth*, which has always emphasised the need for such a system, refers again to the matter in Wednesday's issue, and several of the daily papers have been inspired by some recent remarks of the Registrar of the Bristol Bankruptcy Court as to the injustice of the present position. In the case before him a motor mechanic, against whom an injured pedestrian had recovered 1,626*l.* damages, returned no assets, and the victim of the accident was therefore without any remedy. This sort of thing constantly happens, and we think there is no doubt but that it will not be long before public opinion insists on reform. It is suggested that compulsory insurance would cause premiums to be largely increased, but there seems to be no reason why this should be so; the reckless driver who became a substantial liability to insurers would find himself unable to obtain a driving licence, a result which would be all to the good. And in this connection it is significant that the leading British Companies have all undertaken to carry on business under the recent New Zealand Act under which the premium for insuring a private motor car against third party risks is only 1*l.* as compared with 6*l.* or so for a 12 h.p. car here, under the voluntary system. And we confess to some astonishment at the fact that there has been no public outcry at the scandalous fact that under the law as it stands, even where the motorist is insured against third party risks, an injured person can only recover the damages awarded if the motorist is fully solvent, since if he becomes bankrupt the policy moneys form part of his general assets."

Court of Appeal.

Sittings for 1930.

The following dates have been fixed for the sittings of the Court of Appeal at Wellington, for 1930:—

Monday, 10th March	First Division.
Tuesday, 24th June	Second Division.
Wednesday, 24th September ..	First Division.

Australian Notes.

(By Wilfred Blacket, K.C.)

Since I last wrote there have been some interesting and unusual happenings in our Law Courts. In Brisbane Mr. Justice Douglas has granted an injunction restraining Dr. Ferguson from keeping roosters at his home in a Brisbane suburb so as to cause a nuisance to his neighbours, the Misses Edith, Valerie, and Wanda Ruthning. His Honour held that, although the Misses Edith and Valerie were not sound sleepers and would suffer more discomfort from this cause than most people, there was nothing to be said against Miss Wanda in respect of her sleeping qualities and that the noise complained of seriously interfered with the "comfort physically of the plaintiffs, according to ordinary notions prevalent among people of this country." There was no offer by the doctor to give his birds a sleeping draught before they retired for the night, nor did he make any request that he should be allowed to keep them till Christmas. In New Zealand there are, I think, restrictions as to the places where fowls may be kept. In New South Wales there are none. A man may keep fowls in a yard three feet away from his neighbour's bedroom without breaking any law or regulation, and so the Brisbane decision should be of salutary effect. Under the New South Wales Local Government Act power is given to local authorities to control and regulate the use of premises so as to prevent "objectionable noises thereon, or noises thereon at unreasonable hours." Under this power ordinances or by-laws have been made dealing with internal combustion engines, but the greatest of all suburban nuisances, the noisy motor-cycle, hoots and shrieks from dewy eve till early morn.

Another very interesting action was that brought by Mrs. Wright, of Melbourne, against Mrs. Cedzick, the plaintiffs complaint being that the affections of her husband had been alienated by the defendant. The Full Court of Victoria thought that the claim disclosed no cause of action. From this decision Mrs. Wright has appealed to the High Court: reserved judgment has not yet been delivered. Curiously enough there is now pending in the Supreme Court of New South Wales a case, *Ashton v. Grant*, where a claim for damages is made on similar grounds. The declaration was demurred to and the case stands over pending delivery of the judgment of the High Court.

In *Harris v. Harris*, a divorce appeal to the New South Wales Full Court, the question was whether the lady had complied with an order for restitution of conjugal rights. She had returned upon being served with the order, but had told her husband that she would not stay with him if she found that her affection for him was insufficient. She found that she had only enough affection for him to last three months and at the end of that time she left him. The trial Judge dismissed the husband's petition on the ground that she had complied with the order, but the Full Court held that a conditional return was not a compliance, and that the husband was entitled to a decree.

The Workers' Compensation Commission has had to consider the case of James Burns, known professionally as "Jim Smith," who, while engaged by Leichhurdt Stadiums Ltd. to fight four rounds for £2, was struck heavily and killed. His mother claimed compensation, but the Commission decided that he was not a "worker" within the meaning of the Workers' Compensation Act.

A feature of the recent General Election has been the enthusiasm with which a number of persons issued writs claiming £10,000 damages for libel. About a quarter of a million was claimed in this way, but all the actions were abandoned after the declaration of the results. Then the journalists of New South Wales had a conference and took serious notice of the matter, and passed a resolution which looks as if it had been drafted by a space writer, and shrieks for a judicious blue pencil. It begins with the statement: "That this Conference is of opinion," and concludes with the pious hope "that action be taken that will provide a wholesale (*sic*) deterrent to those who abuse the processes of the Court and penalise the newspapers by the issue of writs without genuine intention" (*siccer*). The resolution was presented to the Attorney-General, Mr. Boyce, next day and he made a very definite promise that the Cabinet would consider the matter.

"Slattery's" Act provides (*inter alia*) as follows: "Whosoever having received or collected any money under any authority, upon terms requiring him to pay, apply, deliver, or account to any person for the same and fraudulently appropriates or fraudulently omits to account in violation of the terms upon which he received such moneys shall be liable to prosecution." There have, unfortunately, been many prosecutions under this section. In a recent case, *R. v. McDonald*, the accused, a solicitor, had received moneys from a client to be invested for him upon short-dated loans. The accused was convicted under the section cited but the Court of Criminal Appeal quashed the conviction on the ground that the section applies only to cases where money has been received from a third person on behalf of the client and has no application to a case where the money has been received from the client himself.

T. M. Slattery, after whom the Statute is familiarly called, made a great deal of history of various kinds in his day. He was for a time the Prothonotary, but resigned and acquired an enormous practice as a solicitor; in politics he became Minister of Justice. Also he was £30,000 short in his trust funds. Being fond of racing he owned a horse called "T.M.S.," the initials being generally interpreted as "Too Many Seconds." Slattery had backed a double to win him £36,000—Famous for the Epsom and T.M.S. for the Metropolitan. Famous won, and one hundred yards from home T.M.S. was five lengths ahead of everything. Then Mooltan came out of the ruck and beat T.M.S. in the last stride. Then there was heard throughout the grandstand a ringing laugh and a merry voice saying: "Did anyone ever see the likes of that?" And the merry voice and the laugh belonged to T. M. Slattery.

In *Sawdon v. Dale*, breach of promise of marriage, tried in Sydney before Mr. Acting-Justice Hammond and a jury, the learned Judge ruled that the statement of a witness that he had seen the defendant kissing the plaintiff was no corroboration of her statement that they were then engaged. The Full Court has unanimously affirmed the decision. The case may be useful upon the point of law involved, but it is also of interest as showing that four at least of our Supreme Court Judges have some knowledge of the habits and customs of members of our community.

Looking through old fee books to-day one entry in particular interested me. In '91 at Bourke (N.S.W.) I defended Cyrus Huxley on a charge of riot. Some lewd fellows of the baser sort had pulled down a sly-grog shop—which quite possibly on general principles ought to have been pulled down—and did other acts *vi et armis*. The evidence that Cyrus Huxley was one of the rioters was contemptible. I asked the Judge to take the case from the jury. He said that he would not do that but that he would tell them to acquit. Upon that I addressed for five minutes only. The Judge told them to acquit, but they came back with a verdict of "guilty." In the town that evening one of the jurors told the reason for the verdict: "Well p'raps he didn't do it, but if he didn't do that he did a lot of things that were a sight worse and he was better in gaol than out of it anyhow, so we sent him up." This was before the passing of the Criminal Appeal Act so the conviction stood. The Judge, greatly astonished at the verdict, imposed a sentence of nine months imprisonment. The night after Cyrus Huxley was released he garotted two men in the main street of Bourke and was sent up for ten years. I have always been afraid that Cyrus was forced into a career of crime by the careless verdict.

I have written of your Solicitors Guarantee Fund Act and of the public spirit of its promoters in very eulogistic terms in Sydney papers, but there is no organisation and not sufficient *esprit de corps* in the profession here to make such a magnificient piece of legislation a possibility with us.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Open season for deer shooting in Hawke's Bay, Waitaki, and Otago Acclimatization Districts.—Gazette No. 77, 14th November, 1929.

Defence Act, 1909. Financial instructions and allowance regulations for N.Z. Military Forces.—Gazette No. 77, 14th November, 1929.

Fisheries Act, 1908. Regulations for trout and perch fishing in Hawke's Bay Acclimatization District.—Gazette No. 77, 14th November, 1929.

Judicature Act, 1908; Judicature Amendment Act, 1913: Sittings of Court of Appeal and Supreme Court for 1930.—Gazette No. 77, 14th November, 1929.

Land and Income Tax Act, 1923; Land and Income Tax (Annual) Act, 1929. Dates for payment of ordinary Land-Tax, special Land-Tax and Income-Tax.—Gazette No. 74, 7th November, 1929.

Orchard and Garden Diseases Act, 1928. Downy mildew on hops declared disease under Act. Introduction into New Zealand of hop-sets of any hop plant prohibited.—Gazette No. 74, 7th November, 1929.

Surveyors' Institute Act, 1908; Surveyors' Registration Act, 1928. Examination Rules for certificates of competency as Surveyors.—Gazette No. 74, 7th November, 1929.

Education Act, 1914. Amended regulations relating to the organisation, examination and inspection of public schools. Amendments to the regulations relating to attendance registers, returns and average attendances; payments of grants in aid of free kindergarten schools; probationary assistants; educational bursaries; district high school fees; secondary schools-staffing, salaries, etc.; manual and technical instruction; public schools—salaries, grading, staffing, etc.; intermediate examination. Amended regulations relating to Free Places.—Gazette No. 69, 17th October, 1929. Amended regulations relating to Training Colleges and Probationers.—Gazette No. 73, 31st October, 1929.

Post and Telegraph Act, 1928. Electric Lines Regulations: Telephone Exchange Service.—Gazette No. 73, 31st October, 1929.

Consolidation of Statutes.

Victorian and New Zealand Systems.

We have recently drawn attention to the meritorious performance of Victoria in its latest consolidation of its statute law, and have stated that New Zealand could learn a great deal from that State in such matters. The Victorian Attorney-General and the Law Institute of Victoria seem, however, to regard the reverse as being the case. The Attorney-General (Hon. Mr. Macfarlan), on the occasion of the passing of a resolution of thanks to His Honour Sir Leo Cussen for his eminent services in connection with the consolidation, is reported as having said:

> "We look forward to introducing a new scheme of consolidating—the Statute Law Revision Committee will shortly be considering that—and we hope that this will be the last consolidation in this form. The intention is to adopt the New Zealand or the Federal plan and to have practically a continuous system of consolidation, and there is no doubt that Sir Leo will give us considerable assistance in that connection."

And the *Law Institute Journal*, in its record of proceedings of the Council of the Institute, says:

> "The Council has under its consideration the desirability, or otherwise, of a continuous consolidation of statutes, instead of a complete consolidation on occasions separated by long intervals. The New Zealand Parliament and the Commonwealth Parliament adopt the practice of a partially continuous consolidation of the Statutes. There is much to be said for each side of the matter."

The practice of the Commonwealth Legislative as to consolidation may be such as to warrant the application to it of the description "partially continuous"; but there is no justification at all for the application of this description to our so-called "system" of the annual consolidation, apparently at random, of a few enactments. Only fourteen years have elapsed since the last general consolidation in Victoria as against twenty-one years here. The New Zealand practitioner has some twenty-six volumes of extant statute law while his Victorian colleague has to consult five or six volumes at the most. What attractions our spasmodic practice has for Victoria it is difficult to imagine.

Bench and Bar.

The Hon. Mr. T. M. Wilford, K.C., Minister of Justice and Defence, has been appointed to the High Commissionership. Apart altogether from any question of party politics it is a matter of considerable gratification that this responsible office has once again come the way of a member of the Profession.

Mr. H. F. Johnston of the firm of Johnston, Beere & Co., Wellington, has been nominated as the Reform Party's candidate for the Hutt electorate at the by-election necessitated by the resignation of the Hon. Mr. T. M. Wilford, K.C.

"It may be said that claims for damages for personal injuries in connection with driving form the staple litigation of to-day."

—Mr. Justice Salter.

The Rise of Bureaucracy.

Or the Growing Interference of the Government Official with the Liberty of the Subject.

The continuous growth of bureaucratic government has during the last few years agitated to no small extent the minds of the members of the legal profession both in England and in New Zealand. The question was raised at the recent Provincial Meeting of the English Law Society, held at Bournemouth at the beginning of last month, in a paper read by Mr. H. G. Wedd. The illustrations chosen by the author are drawn, of course, from English statutes and regulations and some of the examples given were apparently not altogether happy, for his paper received, in matters of detail, a fair measure of criticism. Many examples can be found in New Zealand and the whole question is one of such importance that it is thought that New Zealand practitioners will find food for reflection in Mr. Wedd's paper, and we accordingly print it below.

"In approaching such a subject as I have chosen for this paper, the first thing that occurs to the mind is the difficulty of dealing with a subject of such size and importance within limits sufficient to prevent my becoming tedious or exceeding the time allotted to the reading of a single paper, so it shall be my endeavour to be as concise as possible.

"Looking back for an instant at recent history, we may date the rise of the evil from the sudden craze for creating new ministries (each with its attendant principal and under-secretaries, clerks, typists, office boys, book-keepers, and inspectors) which broke out about 1912 and raged till after the war. These new ministers and officials sought at once for some means of earning their salaries and justifying their existence, and their efforts in almost every case led them into interfering in some branch of the life of the nation, regardless in many cases whether such interference was justifiable or not. For example, the Ministry of Transport decreed that every owner of a motor-car should have a document called a registration book. It would be interesting to find out what expense was caused to the country by the printing, distribution and checking of these books, and whether in any single case they have proved of the slightest use.

"The Ministry of Health has now ordained that every man who milks a cow shall first wash his hands, and presumably inspectors are appointed to enforce the ordinance, but I have not heard of any sanitary inspector who has caught a milker transgressing this stringent regulation, or of a summons being issued against the offender before the magistrates. We may have a test case one day as to what the word 'washing' means; perhaps the Ministry will provide a regulation Mark 1 type of soap and towel for use by milkers. I was told recently, however, by a practical farmer that if the 'Milk and Dairies Order' of 1926 was strictly carried out it would be impossible for any farmer to produce a single gallon of milk, and I believe the Order is treated as more or less of a dead letter. It is possible, it seems, for even a Ministry to go too far.

"The earliest and perhaps the most striking example of the power of the official can be found in the administration of the Housing Act, 1919. Under that Act the need of houses was mentioned, and the Ministry of Health was given power to see that the local authorities built them, or themselves to step in and build them, no limit of any kind being placed on the expenditure to be incurred, but (as my hearers no doubt remember) not more than a penny rate could be levied on the locality concerned. The cost of building went up to somewhere about one thousand pounds per house, and 208,000 houses were built all over the country which have cost, are costing, and will apparently forever cost, the taxpayer 40*l.* a year per house, a total of nearly 8½ millions a year. In one case I know of a local authority which pointed out again and again that to build a house for a labourer at a cost of 1,000*l.* was absurd, but the Ministry would hear no excuse: the houses must be built. All these structures, mostly hideous and badly (because hurriedly) built, remain scattered all over the country as a monument to official ineptitude.

"A further instance. In 1925 it occurred to some official that no Church of England clergyman was capable of appointing an efficient collector of tithes, so what happened? The Tithe Act of 1925 was pushed through Parliament, which took away a whole class of property from the clergy and transferred it to the officials representing Queen Anne's Bounty, but created fresh officials to supersede the existing collectors, and various committees. The tithe is now, after being collected locally, sent first to an 'area' headquarters; from those headquarters it is sent to London, to Queen Anne's Bounty: there a fresh staff of officials sorts it all out again and sends it back (less some 10 per cent.) to the parishes it originally came from.

"More officials have now been created under the Rating Act, 1925, and in some counties one of their first proceedings is to rate the public elementary schools, which are, of course, maintained by the rates. Thus the County Rating Office levies rates on the County Education Office property, the County Treasury Office takes the money and pays it out again to the County Education Office to make up for the increased cost of maintaining the schools. There is even a worse case under the same Act. The gentlemen who voluntarily undertake the management of our village halls and parish rooms are being assessed and bullied to pay rates on their structures. Now I do not believe for one moment that the ratepayers as a whole wish those buildings rated: they are run practically entirely *pro bono publico*, and often have a hard struggle to 'make ends meet.' If they were released, as they mostly have been, from payment, the other ratepayers might be a penny or twopence worse off in the year—a very modest contribution to the upkeep of the hall—but the ratepayers are not consulted: the official body is stronger than the public whose servants they are supposed to be.

"Nothing can show the extent of the evil more clearly than a comparison between the figures of the present Budget and those of 1914. In both years the cost of the Army and Navy is very much the same, round about a paltry 80,000,000*l.*, whereas the Civil Service estimates for this year are 227,000,000*l.*, practically three times as much as the Army and Navy. What benefits, I ask, does the nation receive for these 227,000,000*l.*?

"Besides the setting up of these Ministries, more and more Acts of Parliament have been passed, giving Ministers all sorts of powers to make regulations and ordinances affecting the liberties of the subject. Thus, by the Railway and Canal Traffic Act, 1887, secs. 24

and 31, the whole of the railway companies in the kingdom can only make such charges as a Government Departments (i.e., the Board of Trade) thinks fit. To such an extent has the custom of legislation by Departments grown that in 1920 eighty-two Acts of Parliament were passed and 2,473 Statutory Rules and Orders. The Safeguarding of Industries Act, the Advertisements Regulation Act, 1925, the London Traffic Act, 1924, the Rating and Valuation Act, 1925, afford similar instances of Government Departments being given what are practically legislative powers. By the Patents, Designs and Trade Marks Act, 1883, rules to be made by the Board of Trade 'shall be of the same effect as if they were contained in this Act.' Under the National Insurance Act, 1911, a statutory officer, known as an insurance officer, decides what unemployment benefit an injured employee may draw, and the employee may appeal to a Board of Referees. If the Court of Referees upholds the insurance officer, no further appeal is possible, but if the Court sides with the injured man the officer can appeal to yet another official, the umpire appointed by the Crown, whose 'decision shall be final and conclusive on matters of both fact and law'—(sec. 88 (1) (*a*). In the Rating and Valuation Act, 1925, the Minister is even given power to 'modify the provisions of this Act so far as may appear necessary or expedient'—a most extraordinary provision.

"Enough has surely been said to establish the existence of evil, and to prove that the executive branch of the State is gradually usurping both the legislative and judicial functions. What, then, is the remedy? Parliament is responsible for this horde of officialdom. It is Parliament who, like the fisherman in the Arabian Nights, has opened the bottle and released the Genie who, grown to enormous proportions and with its head in the clouds is overshadowing the world we live in. It is the House of Commons who is responsible and who must be called on to grapple with its own creation: and the question of economy should have been brought to the forefront in the recent election. If only Mussolini could be invited to go through the Civil Service estimates when the next Budget is in course of preparation we should no doubt see a change. In default of this we must wait till the next election; but when it comes all parties must join hands to ensure that no member shall go to Westminster who has not given a solemn pledge that the expense of the Civil Service shall be thoroughly and drastically reduced. When once the Genie is subdued, the sun of national prosperity will surely shine more brightly upon the fair country so dear to all our hearts."

"No one can doubt but that a great deal of legislation must be of an experimental and tentative nature, and the more it savours of these attributes the more necessary it is to approach its formation and its passage with caution and with discrimination."

—Mr. Justice Eve.

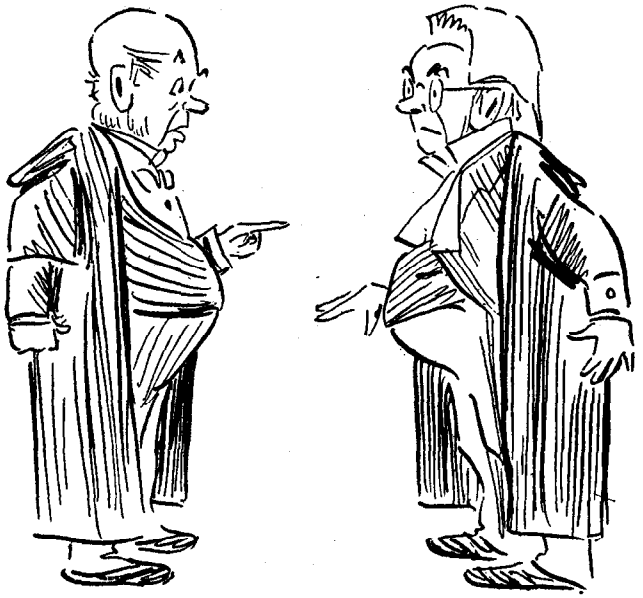
"Legislation framed for a particular emergency ought to be put an end to or suspended as soon as the emergency ceases."

—Mr. Justice Eve.

Forensic Fables.

THE PRUDENT JUDGE AND THE STOUT USHER.

A Great Many Years Ago there Lived a Prudent Judge who Gave Universal Satisfaction. He was a Magnificent Lawyer. Legal Problems, however Complicated and Obscure, Never Caused him the Least Alarm. When the Doctrine of Equitable Subrogation was Mentioned, the Prudent Judge Brightened Up; and Such Topics as Anticipatory Breach of the Contract, the Provisions of the Harter Act, and Covenants Running with the Land Filled him with Joy. And, Wonderful to Relate, the Prudent Judge was Just as Good when it Came to a Question of Fact. As the Prudent Judge was a Bachelor and a Recluse, whose Practice at the Bar had been of the Stuffiest Description, there Appeared to be no Reason for this Phenomenon.



But there was. Quite Early in his Judicial Career the Prudent Judge Detected that the Stout Usher in his Court was a Person of Great Good Sense. He therefore Summoned the Stout Usher to his Room, Pressed a Substantial Offering into his Hand, and Begged him to Abandon his Habit of Sleeping throughout the Proceedings, and to Pay Close Attention to the Evidence in Each Case. The Stout Usher Orally Agreed so to Do. Thereafter, when the Court Adjourned, the Prudent Judge would Ask the Stout Usher what he Thought about the Various Witnesses. The Stout Usher was Never in Doubt. Sometimes he would Say that the Plaintiff was a Bit of a Liar; on other Occasions he would Pick Out the Defendant as the Ananias of the Piece. Under the Able Guidance of the Stout Usher the Prudent Judge Never went Wrong. And when At Last the Prudent Judge Retired, the Attorney-General, in a Valedictory Address, Dwelt upon his Uncanny Knowledge of Human Nature and his Marvellous Capacity for Distinguishing Truth from Fiction.

MORAL: *Ask the Usher.*

Supreme Court.

Sittings for 1930.

The dates for the commencement of the sittings of the Supreme Court in the various centres have now been fixed and are as follows :—

NORTHERN JUDICIAL DISTRICT.

Auckland : 4th February ; 6th May ; 29th July ; 28th October.

HAMILTON JUDICIAL DISTRICT.

Hamilton : 24th February ; 9th June ; 25th August ; 17th November.

TARANAKI JUDICIAL DISTRICT.

New Plymouth : 24th February ; 26th May ; 18th August ; 17th November.

GISBORNE JUDICIAL DISTRICT.

Gisborne : 25th February ; 4th June ; 19th August ; 11th November.

WANGANUI JUDICIAL DISTRICT.

Wanganui : 17th February ; 19th May ; 11th August ; 10th November.

WELLINGTON JUDICIAL DISTRICT.

Wellington : 3rd February ; 5th May ; 28th July ; 28th October.

Palmerston North : 4th February ; 6th May ; 29th July ; 28th October.

Napier : 17th February ; 26th May ; 11th August ; 3rd November.

Masterton : 4th March ; 2nd September.

NELSON JUDICIAL DISTRICT.

Nelson : 18th March ; 15th July ; 2nd September.

Blenheim : 11th March ; 8th July ; 25th November.

CANTERBURY JUDICIAL DISTRICT.

Christchurch : 11th February ; 6th May ; 19th August ; 28th October.

Timaru : 4th February ; 29th April ; 29th July ; 21st October.

WESTLAND JUDICIAL DISTRICT.

Hokitika : 26th February ; 11th June ; 10th September.

Greymouth : 26th February ; 11th June ; 10th September.

OTAGO AND SOUTHLAND JUDICIAL DISTRICT.

Dunedin : 3rd February ; 28th April ; 28th July ; 28th October.

Invercargill : 17th February ; 12th May ; 18th August ; 10th November.

Oamaru : 4th March ; 2nd September.

" Cynical remarks are sometimes heard to the effect that there are too many lawyers in the legislative halls of the Empire. So far as Canada is concerned I believe that to lawyers is largely due the continuous betterment evidenced in the legislation of the country, both Dominion and Provincial."

—Rt. Hon. Ernest Lapointe.

Legal Literature.

Paterson's Licensing Acts with Forms.

Thirty-ninth Edition : 1929 : By H. B. HEMMING and S. E. MAJOR.
(pp. cxv : 1292 : clxi : Butterworth & Co. (Publishers) Ltd. and Shaw & Sons, Ltd.)

As in the case of the *Annual* and *Yearly Practices*, *Stone's Justices Manual*, and *Willis's Workmen's Compensation*, the very fact of an annual appearance, coupled with frequent use by the profession, ensures the complete accuracy of this work, for if any error appears it is quickly discovered and just as quickly can be remedied. To those familiar with past editions of *Paterson* this, the thirty-ninth, by the same editors as its predecessor will require no commendation from a reviewer. Nor is it proposed to deal at length with the work for the benefit of the very few who do not know it ; but it may, however, be advisable to point out that its scope is much wider than generally imagined and that it deals among other matters with the law relating to clubs, theatres, cinematograph exhibitions, music and dancing, racecourses, billiards, compensation, covenants, contracts of sale of licensed premises, and rates and taxes on licensed property.

New Books and Publications.

Companion to the Companies Act, 1929. By the Hon. Fletcher Moulton. (Eyre & Spottiswoode). Price 18/-.

Dart's Law and Practice of Vendors and Purchasers. Eighth Edition. Two Volumes. By E. P. Hewitt and M. R. C. Overton, M.A. (Stevens & Sons, Ltd.). Price £5 10s.

Wilshere's Analysis of Taswell Langmead's Constitutional History. Fifth Edition. (Sweet & Maxwell Ltd.). Price 8/-.

The Great Seal.

The Great Seal must not be taken outside the realm, and when, in 1913, Lord Haldane, the Lord Chancellor, was invited to visit Canada and the United States provision had to be made for its custody during his absence, and accordingly Viscount Morley, Earl Beauchamp, and Sir Herbert Cozens-Hardy, the then Master of the Rolls, were appointed Commissioners for this purpose. Recently a Commission has been appointed for the like purpose during any absence of Lord Sankey from the United Kingdom. There are four Commissioners on this occasion—Lord Muir Mackenzie, Mr. Justice Hawke, Mr. Justice Macnaghten, and Mr. Justice Luxmoore : the omission of the Master of the Rolls, who is usually included, was no doubt due to his then himself being abroad.